TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917

No. [redacted] 16

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, APPELLANT,

vs.

CRANE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED SEPTEMBER 24, 1917.

(24,758)

(24,562)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 351.

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, APPELLANT,

vs.

CRANE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1915.

1 *Caption.*

Be it remembered: That on the 13th day of November, A. D. 1914, before the Honorable Richard W. Walker, United States Circuit Judge for the Fifth Circuit, Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, and Honorable Rhydon M. Call, United States District Judge for the Southern District of Florida, in the United States Court room in the city of Fort Worth, the following cause came on for hearing upon the application of complainant and the following proceedings were had and done, to-wit:

2782. In Equity.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

2 *Plaintiff's Original Bill.*

Filed November 6th, 1914.

UNITED STATES OF AMERICA,
Northern District of Texas:

In the District Court of the United States for the Northern District of Texas, at Dallas. In Equity.

No. 2782.

To the Honorable Edward R. Meek, Judge of said Court:

1.

Crane Company, a corporation, organized under the laws of the State of Illinois, a citizen of the State of Illinois, and of no other State, domiciled at Chicago, brings this its bill against Ben F. Looney, whose middle name is unknown to the plaintiff, who is a citizen of the State of Texas, an inhabitant of the Northern District of Texas, and who resides in the City of Greenville in the County of Hunt, as Attorney General of the State of Texas; and against F. C. Weinert, whose first and second names are unknown to plaintiff, who is a citizen of the State of Texas, an inhabitant of the Western District of Texas, and who resides in the City of Seguin in the County of Guadalupe, as Secretary of State of the State of Texas; but each of said defendants can be found in the City of Austin, Travis County, Texas.

Crane Company, plaintiff, shows:

2.

That this suit is brought for the purpose of restraining defendants, in their respective official capacities, from enforcing against plaintiff those laws of the State of Texas requiring foreign corporations
3 doing business therein to secure a permit and pay the fees provided therefor, and to pay an annual franchise tax therefor, and providing penalties for failure to secure such permit and to pay such franchise tax, and providing for the enforcement of those penalties in part by the Secretary of State and in part by the Attorney General, on the ground that those laws of the State of Texas conflict with the Constitution of the United States in that they take plaintiff's property without due process of law, burden its business of conducting interstate commerce, and deny to plaintiff the equal protection of the laws.

3.

That plaintiff is authorized by its charter to enjoy and exercise all the powers incident or necessary to carry out and execute the business of manufacturing, merchandising, buying, selling, and in every manner dealing in and with all kinds of steam, gas, water, oil, mine, mill, factory, engineers', plumbers', railroad, hardware and builders' supplies and material, and agricultural machinery and supplies. That plaintiff was originally incorporated under the name of Northwestern Manufacturing Company by an Act of the Legislature of Illinois, approved February 15, 1865; that by an amendment to its charter in 1872 the name was changed to Crane Brothers' Manufacturing Company, and by another amendment in 1890 the corporate name was changed to Crane Company, which is now plaintiff's corporate name.

4 4.

That all of plaintiff's authorized capital is paid in, which is 17,000,000 dollars, and its surplus and undivided profits are 8,139,000 dollars, and that all of its property, wherever situated, does not exceed in value the amount of its capital, surplus, and undivided profits; that the permit fee hereinafter mentioned, when applied to plaintiff, amounts to 17,040 dollars, and the franchise tax, hereinafter mentioned, when applied to plaintiff, amounts to 1,966 dollars.

5.

That more than twenty years ago the plaintiff, which was then largely engaged in the business of shipping its goods, wares, and merchandise from one state into another for sale and delivery and for delivery after sale, entered the State of Texas with its goods, wares, and merchandise, selling them through traveling salesmen who took orders therefor and sent the orders to plaintiff's principal office and place of business at Chicago for acceptance and filling through shipment; and through mail orders sent in by merchants to plaintiff's Chicago office for acceptance and the shipment of goods to fill the same, and continuously since the plaintiff entered the State of Texas it has been engaged in interstate commerce between that state and

other states of the Union, and has been also actively engaged in interstate commerce between each and every one of the states of
5 the American Union, and the other states thereof, and in foreign commerce, shipping goods for sale, or after they have been sold, from the United States into Canada, into Mexico, and into other foreign countries.

6.

That at its principal office, as hereinbefore alleged, in the City of Chicago, State of Illinois, all of its corporate business, as distinguished from its mercantile and manufacturing business, is transacted and at the Chicago office all of its executive officers maintain their offices in connection with the plaintiff's business, and transact all of the plaintiff's business which is transacted by the executive officers of the plaintiff; that the President maintains his office at Chicago; that the Vice Presidents maintain their offices at Chicago; that the Secretary and the Assistant Secretaries, the Treasurer and all the Assistant Treasurers maintain their offices at Chicago; that the corporate meetings of the plaintiff are all held at the offices at Chicago; that its stock book is kept there, and all transfers of its capital stock are registered there, and the results of the plaintiff's business everywhere are assembled into accounts which are kept at Chicago, which are the only books of account that disclose the results of all of plaintiff's business operations.

7.

That besides its offices at Chicago, the plaintiff, for the purpose of facilitating the transaction of its interstate business as aforesaid, and its commerce with foreign nations, and in order that it may
6 more conveniently serve those with whom it has transactions in such commerce, has established agencies at the following places each of which was established in the year set opposite to the name of the place, to wit:

Omaha	1886	Birmingham	1905
Kansas City	1887	Oklahoma City	1905
Los Angeles	1887	Boston	1906
Philadelphia	1890	Winnepeg	1906
San Francisco	1891	Tacoma	1906
Minneapolis	1892	Vancouver	1908
St. Paul	1893	Atlanta	1908
New York	1894	Newark	1908
Duluth	1894	Little Rock	1908
Portland, Ore.	1894	Wichita	1908
Sioux City	1897	Des Moines	1908
Oakland, Cal.	1898	Terre Haute	1909
Cincinnati	1899	Indianapolis	1909
St. Louis	1899	Washington	1909
Seattle	1902	Aberdeen	1910
Salt Lake City	1902	Sacramento	1910
Baltimore	1904	Great Falls, Mont.	1911
Fargo	1904	Knoxville	1911

Spokane, Wash.	1904	Detroit	1911
Dallas	1904	Davenport, Ia.	1912
Memphis	1904	Springfield, Mass.	1913
Muskogee	1909	Bridgeport, Conn	1914

7

8.

That in the year 1904, when it established its agency at Dallas, it did not at once apply to the State of Texas for a permit to do business therein for the reason that its business consisted, as it does now, of interstate commerce and such other transactions as are incidental and are so closely related thereto as that they either in whole or in part cannot be separated from the interstate commerce business of the plaintiff without burdening such commerce and rendering the conduct thereof more expensive and less convenient.

9.

That during the year 1904, when plaintiff established its agency at Dallas, and until after the 16th day of January, 1905, the date when it took out a permit under the laws of the State of Texas, as hereinafter shown, the State of Texas by a pretended law permitted a foreign corporation with a capital stock in excess of one million dollars to secure a permit to do business in Texas by making application therefor and performing certain conditions, including the payment of a fee of 200 dollars, which was the maximum fee required to be paid by a foreign corporation applying for a permit to do business in the State of Texas; that the plaintiff, on the 16th day of January, 1905, fearing that it might be molested in the transaction of its business by the Secretary of State and by the Attorney General of Texas, and that it would be embarrassed in its
8 suits and defenses, incident to its business, applied to the State of Texas for a permit to do business therein, complied with the conditions required by said pretended law precedent to its securing such permit, including the payment of 200 dollars permit fee, and on the 16th day of January, 1905, received from the Secretary of State of the State of Texas a permit to do business therein for the succeeding ten years.

10.

That in the year 1906, in order that it might more economically and conveniently conduct its said interstate commerce business and the transactions incidental thereto, plaintiff purchased, in the City of Dallas, a certain lot for which it paid the sum of 30,000 dollars, and into which it caused to be run switches connecting this property with the railroads entering the City of Dallas, and from thence extending directly into the States of Oklahoma, Arkansas and Louisiana, and indirectly into all of the states of the Union, and into Mexico and Canada, and on said lot also caused to be constructed a five-story and basement warehouse peculiarly adapted to that heavy class of goods handled by the plaintiff, and with the extraordinary strength required of such a building for goods of that quality, all of which improvements on said lot cost the plaintiff the approximate sum of

91,520 dollars in addition to the purchase price of the lot; and that on account of the peculiar construction and excess strength put into said building, which would not be required in a building for
9 the storage of ordinary goods, nor any goods save goods substantially identical with the plaintiff's, its said investment has become permanent and cannot be liquidated into money without involving a ruinous sacrifice in the difference between the reasonable cost of said improvements and what they would be valued at in a sale of the property.

11.

That of its total capital and surplus of 25,139,000 dollars, only 301,179 dollars thereof is situate in the State of Texas, and this investment in Texas consists of the following items: cash, 4,500 dollars; real estate (consisting of the lot in Dallas and the improvements thereon and incidental thereto), 121,520 dollars; furniture and fixtures, 11,882 dollars; and merchandise, 163,277 dollars.

12.

That plaintiff's gross receipts and gross sales are substantially identical, and the total gross sales of the plaintiff for the year 1913, the last year for which the total figures are available, were 39,831,000 dollars; that of said sales only 1,019,750 dollars had any relation to the State of Texas, the other sales being of goods sold and delivered in other states, territories and countries than Texas without ever having come within the territorial boundaries of Texas; that 1,019,750 dollars of the said gross sales had relation to Texas as follows: plaintiff received orders from customers in Texas at its Chicago
10 house forwarded by its Texas agency for direct shipment to its various customers in Texas, of 36,741 dollars, which it shipped direct to said customers; it received orders at its Dallas agency for 80,011 dollars of pipe, which it forwarded to a pipe company at Pittsburgh, Pa., for direct shipment, and which was shipped directly to purchasers in Texas; that plaintiff received orders for 83,886 dollars of goods at its Dallas agency not of its own manufacture and not of pipe, from purchasers in Texas which it ordered from divers factories and wholesale houses outside of Texas to be shipped direct to purchasers in Texas, and which were so shipped; that plaintiff's agency in Kansas City received orders from purchasers in Texas for 16,766 dollars of goods which were shipped from Kansas City to the purchasers in Texas; that plaintiff's Birmingham agency received orders for 11,210 dollars of goods from purchasers in Texas, which were shipped direct to such purchasers; and the plaintiff received at its Chicago house orders from customers in Texas, which did not come through its Dallas agency, for goods amounting to 142,000 dollars, which it shipped direct to the purchasers from Chicago. That plaintiff, in its warehouse at Dallas, carried a stock of goods in the year 1913, as it still does, consisting for the most part of original packages of goods, which the plaintiff has shipped into the State of Texas for sale to purchasers therein, and about seventy-five per cent. of such goods are shipped out by plaintiff again from its warehouses

to purchasers in unbroken packages; that during the year
11 1913 the plaintiff shipped from its Dallas and Texas City warehouses to persons in Texas 649,136 dollars of goods, three-fourths of which, as aforesaid, were sold and delivered by the plaintiff in the original packages in which plaintiff had brought the same into the State of Texas.

13.

That the plaintiff now employs nine salesmen who travel in the State of Texas soliciting orders for the sale of plaintiff's goods, all of whom solicit orders for goods to be shipped from the Chicago house and from the pipe company at Pittsburgh, Pa., and from other factories and wholesale houses located beyond the limits of the State of Texas, and none of whom take any orders for other goods save such as plaintiff ships into the State of Texas and warehouses for the purpose of filling orders therefor either secured by its traveling men, or received through the United States mail, or by telephone or by telegraph.

That unless its traveling salesmen, who travel in Texas can take orders for goods to be filled out of broken packages, plaintiff's interstate commerce business cannot be carried on to the same extent, or in as large volume as it is conducted by plaintiff, nor at a reasonable profit, and unless said traveling men can take orders for goods to be shipped from beyond the state, and can secure orders to be filled with unbroken packages neither they, nor either of them, can be main-
tained by the plaintiff because the volume of business in
12 broken packages of itself would be insufficient to justify their employment and the maintenance by plaintiff of its agency in Dallas, for only approximately 162,284 dollars of said 1,019,750 dollars of business done by plaintiff in Texas is of goods sold in broken packages, whereas 857,466 dollars thereof is of goods which either never came to plaintiff's warehouses in Texas, or were sold from them in unbroken packages.

14.

That other than the nine traveling salesmen hereinbefore referred to, plaintiff has within the State of Texas at its agency at Dallas and at a warehouse it rents at Texas City, forty employees, consisting of a manager, bookkeepers, stenographers, shipping clerks, porters and teamsters; that its gross profits on its business incident to its agency at Dallas and its warehouse at Texas City for the year 1913 was 20.13 per centum of its sales, and that plaintiff realized a net profit, after charging five per centum on the investment (consisting of real estate, buildings and fixtures), of 5.18 per centum of its said sales, and realized on the same basis an average net profit for the last nine years of 4.475 per centum.

15.

That from 1904 to 1914 inclusive, it has paid to the State of Texas in franchise taxes the sum of 14,800 dollars, distributed as follows:

13 In 1904..... 480 dollars
In 1905..... 730 dollars
In 1906..... 730 dollars
In 1907..... 730 dollars
In 1908..... 1,506 dollars
In 1909..... 1,600 dollars
In 1910..... 1,642 dollars
In 1911..... 1,776 dollars
In 1912..... 1,776 dollars
In 1913..... 1,882 dollars
In 1914..... 1,948 dollars; that in addition to said franchise taxes, the plaintiff has paid annually ad valorem taxes on all of its property situated in the State of Texas, to the State of Texas, and to the counties of Dallas and Galveston, and to the City of Dallas. Those for the year 1913 amounted to 6,202.38 dollars; which ad valorem taxes were assessed and levied on the value of plaintiff's real estate in Texas, its cash on hand, its merchandise, and its furniture and fixtures. And, in addition to said ad valorem and franchise taxes, plaintiff has paid a permit tax of 200 dollars.

16.

That the permit which it secured from the State of Texas on January 16, 1905, expires by its limitation on January 15, 1915. That since the year 1907 the legislation of the State of Texas provides that as a condition precedent to obtaining a permit to do business in Texas, each foreign corporation of the class to which plaintiff belongs shall pay fees as follows: fifty dollars for the first
14 10,000 dollars of its authorized capital stock, and ten dollars for each additional 10,000 dollars or fractional part thereof, and that these fees must be paid in advance into the office of the Secretary of State before he can issue such permit. (Rev. Stat. of Texas, Arts. 3837 to 3840). The legislation of the State, however, as to payment of fees for a permit for mutual building and loan companies, while providing for the same fees as for those of the class to which the plaintiff belongs, provides that the fee shall be based upon the capital invested in the State of Texas; and the legislation of the State levying taxes on the gross receipts of the corporations so taxed, provides that the rate shall be calculated only on the receipts from the business of such corporation in Texas. That these classifications are arbitrary and fanciful and deprive the plaintiff of the equal protection of the law in that plaintiff's business and property both without as well as within the State are taxed while the other corporations are exempted as to their business and property beyond the State. The legislation of the State also provides that any foreign corporation desiring to transact business in this State, or to solicit business in this State, shall be required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall, upon the payment of the fees hereinbefore mentioned, issue to such corporation a permit to transact business in this State. (Rev. Stat. of Texas, Art. 1314.) As a further condition to the issuance of a permit by the Secretary of State to

any foreign corporation, the corporation is required to make
15 an affidavit through one of its officers that it has not been a party to any agreement which would violate the anti-trust laws of the State of Texas. (Rev. Stat. of Texas, Art. 1315.) The system of taxation also provides that no foreign corporation can maintain any suit or action, either at law or in equity, in any of the courts of this State upon any demand, whether arising out of contract or of tort, unless at the time such contract was made or tort committed, the corporation shall have filed its articles of incorporation in the State of Texas under the provisions of the law of the State of Texas for the purpose of procuring a permit. (Rev. Stat. of Texas, Art. 131).

The Constitution of the State of Texas, in Section 22, Article 4 thereof, prescribing the duties of the Attorney General, reads thus: "He shall represent the State in all suits and pleas in the supreme court of the state in which the state may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be necessary and proper to prevent any private corporation from exercising any power, or demanding or collecting any species of taxes, toll, freight, or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law."

Under this provision of the Constitution, the courts have held that it is the duty of the Attorney General to enjoin any foreign corporation transacting business in the State of Texas without having first taken out a permit under the law of 1907. (Western Union Tel. Co. vs. State, 121 S. W. R. 195.)

16 17.

In the year 1907 the legislature of the State of Texas enacted that every foreign corporation of the class of the plaintiff authorized, and that might thereafter be authorized, to do business in this State shall, on or before the first day of May of each year, pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax for such corporation for the year following shall be two dollars on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation issued and

outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on
17 each five thousand, or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars, and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten million dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars. (Rev. Stat. of Texas, Art. 7394.)

18.

The system of pretended laws relating to franchise taxes provides that, when a permit to do business in the State is applied for, as well as in the month of January of each year, affidavits shall be made by each foreign corporation as to the amount of its authorized capital stock, the amount thereof issued and outstanding, and of its surplus, and of its undivided profits, and that the Secretary of State shall make investigations sufficient to satisfy himself touching the amounts thereof, and that the franchise tax shall be calculated either on the amount of the authorized capital stock, or on the amount of the capital stock issued and outstanding plus the surplus and undivided profits, as the same may be largest. (Rev. Stat. of Texas, Arts. 7396, 7397, and 7397*a*.)

Failure to make this report subjects the company to a fine of ten dollars for each and every day after the first day of February
18 that it shall fail to make this report, and the Attorney General is empowered and directed to bring suit in the name of the State for the collection of said penalties. (Rev. Stat. of Texas, Art. 7397.)

Should its capital stock during the year be increased, every foreign corporation shall pay in advance a supplemental franchise tax for the remainder of the year. (Rev. Stat. of Texas, Art. 7398.)

Failure to pay the franchise tax at the time the same becomes due and payable subjects a foreign corporation to a penalty of 25 per centum of the amount of such franchise tax due by such corporation; and, if the amount of such tax and penalty be not paid in full on or before the first day of July thereafter, such corporation shall, for such default, forfeit its right to do business in this State, which forfeiture shall be consummated without judicial ascertainment by the Secretary of State entering upon the margin of the record kept in his office relating to such corporation the words, "right to do business forfeited," and the date of such forfeiture; and any corporation whose right to do business shall be thus forfeited shall be denied the right to sue and defend in any of the courts of this State, except in a suit to forfeit the charter of such corporation; and, in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief shall be granted to such corporation un-

less its right to do business in this State shall be revived.
19 And each and every director and officer of any corporation whose right to do business within the State shall be so forfeited shall, as to any and all debts of such corporation which shall be created or incurred, with his knowledge, approval and consent within the State, after such forfeiture, and before the revival of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such director and officers were partners. (Rev. Stat of Texas, Art. 7399.)

There is a clause in the law by which any corporation whose right to do business in this State has been forfeited, shall be relieved from such forfeiture by the payment within six months of the full amount of the franchise tax and penalty due by it, together with an additional amount of five per centum of such tax for each month, or fractional part of a month, which shall elapse after such forfeiture. If this be done, then the Secretary of State shall revive and reinstate the right of the corporation to do business within this State by cancelling the words, "right to do business forfeited" upon his record, and endorse thereon the word "revived," and the date of such revival. (Rev. Stat. of Texas, Art. 7400.)

The pretended law also provides that where a forfeiture of the permit occurs, it shall be unlawful for any person, or persons, who were stockholders or officers of the corporation at the time of such forfeiture to do business within this State in or under the
20 corporate name of such corporation, or to use signs or advertisements of such corporation, or similar to the signs and advertisements which were used by such corporation before such forfeiture, and makes it a penal offense for them to do business and until the right has been revived. (Rev. Stat. of Texas, Art. 7402.)

The pretended law further provides that the Attorney General shall be authorized, and it shall be his duty to bring suit for the franchise taxes and penalties, and to enjoin the further doing of business by the corporation. (Rev. Stat. of Texas, Art. 7404.)

19.

That it cannot conduct business in the State of Texas without resort to the courts of said state because 95 per centum of all its causes of action arising from the sale of its goods, wares, and merchandise in the State of Texas, are below the minimum jurisdiction of the Federal Courts, and must be litigated, if at all, in the State Courts, and in addition thereto the plaintiff is liable at any time to be sued in the State Courts under such conditions as to the parties, or as to the amount involved, as that it could not remove the controversy to the Federal Court, and if its right to do business in the State is forfeited under the pretended laws aforesaid, it can interpose no defense to such actions; that the plaintiff has no adequate remedy at law for its protection against the consequences of the enforcement
21 against it of said unconstitutional laws, and will be without remedy unless it can secure such relief only as a court of equity can grant by way of injunction.

20.

That the plaintiff will not, when its present permit expires on the 15th day of January, 1915, nor before that time, apply to the Secretary of State for a permit to do business in Texas, nor meet the conditions necessary for the success of such application, which are the payment of the permit fees aforesaid, and the filing of the affidavits required as aforesaid; nor will the plaintiff, at the expiration of the present franchise tax, on May 1, 1915, pay a franchise tax under said unconstitutional laws for the fiscal year ending May 1, 1916; that unless the plaintiff does comply with said unconstitutional laws the defendant F. C. Weinert, as Secretary of State, will undertake to forfeit on the books of his office, the right of the plaintiff to do business in Texas, and will bring this fact to the attention of plaintiff's debtors, and to the notice of every person having a claim against the plaintiff, and will issue a certificate to that effect to such persons, whereby the courts of the state will be closed to the plaintiff, his certificate being made proof, under the laws of Texas, of facts so certified; and the said Ben F. Looney, as Attorney General, will institute a suit, or suits, against the plaintiff for the collection of penalties for the nonpayment of the franchise taxes, and to oust it from doing business in the State of Texas, and the said defendants
22 acting under what they conceive to be their duty, under said pretended laws, will harass, annoy and impede the plaintiff in its just right to transact its interstate commerce business in the State of Texas, and the business inseparable therefrom, as aforesaid: that the plaintiff will thereby be deprived of its right to do its interstate business and the business incident thereto in the State of Texas in violation of its rights guaranteed to it under the Constitution of the United States in Article 1, Section 8, paragraph 4, which grants to Congress the power to regulate commerce with the foreign nations, among the several states, and with the Indian tribes; and under the Fourteenth Amendment to the Constitution of the United States, and the first section thereof, which guarantees the plaintiff against being deprived by any State of its property without due process of law, and against being denied the equal protection of the laws

21.

That Oscar Branch Colquitt is the duly elected and acting Governor of the State of Texas, and that he can be found in the City of Austin, County of Travis, in the Western District of Texas.

22.

Wherefore, plaintiff prays that the defendant F. C. Weinert, as Secretary of State, be restrained and enjoined, pending this suit, from undertaking in any manner to enforce against the plain-
23 tiff, or any of its officers, agents, or stockholders the permit or franchise tax laws of the State of Texas relating to foreign corporations, and from making any entry in the books of his office signifying that the permit of the plaintiff to do business in Texas has been forfeited, and from issuing any certificates to any person whom-

soever to the effect that the permit of this plaintiff to do business in Texas has been forfeited; and that the said Ben F. Looney, as Attorney General, be restrained and enjoined from attempting in any wise to enforce against the plaintiff the permit and franchise tax laws of the State of Texas relating to foreign corporations, and from instituting any suit for the collection of any franchise tax or penalties, or any suit to cancel the permit of the plaintiff to do business in Texas on the ground that it has failed to pay the fees required by the laws of Texas for foreign corporations to do business therein, and from instituting any suit against the plaintiff to enjoin it from transacting business in the State of Texas, based on the failure of the plaintiff to pay said permit fees or franchise taxes; and that said injunctions, or a final hearing be perpetuated, and that the plaintiff recover of the defendants its costs, and for such other and further relief as it may be entitled to in the premises.

23.

The plaintiff further prays that his excellency Oscar Branch Colquitt, the Governor of the State of Texas, and each of the defendants, have due notice of its application for a temporary injunction
24 herein, and that a subpœna issue to each of the defendants according to the practices in equity, requiring them and each of them to answer this bill, but not under oath, the oath of the defendants being hereby expressly waived; and as in duty bound plaintiff will ever pray.

CRANE COMPANY,
By ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiff.

STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, on this day personally appeared James E. Ludlow, who being duly sworn, says on oath that he is agent for Crane Company, a corporation, plaintiff in the foregoing bill; that he is cognizant of the facts set forth in said bill upon which the relief therein is asked, and that the facts therein set forth are true in substance and in fact, and further affiant saith not.

JAMES E. LUDLOW.

Subscribed and sworn to by James E. Ludlow before me on this the 5th day of November, A. D. 1914.

Witness my hand and official seal on the date last above written.

[SEAL.] H. C. BISHOP,
Notary Public in and for Dallas County, Texas.

Filed November 6th, 1914. Louis C. Maynard, Clerk.

25 *Order for Hearing on Application for Injunction.*

Filed November 6th, 1914.

In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2782. In Equity.

CRANE COMPANY
vs.
BEN F. LOONEY, as Attorney General, et al.

The Bill of Complaint in foregoing cause having been this day presented to me, Edward R. Meek, United States District Judge for the Northern District of Texas, and it appearing therefrom the same seeks an interlocutory injunction restraining the action of certain officers of the State of Texas in the enforcement or execution of certain statutes of the State of Texas, I have this day called to my assistance to hear and determine such application, the Honorable Richard W. Walker, United States Circuit Judge for the Fifth Circuit, and Honorable Rhydon N. Call, United States District Judge for the Northern District of Florida, and they have consented to serve in that capacity.

And it is thereupon ordered that the said application for interlocutory injunction, prayed for in the Bill of Complaint in this cause, be set down for hearing before the three Judges above named, in the United States District Court Room, at Fort Worth, Texas, on Friday, November 13th, 1914, at 10 o'clock, A. M., or such time thereafter as it may be heard, and that notice of such hearing be given to each of the defendants in this cause and to His Excellency Oscar Branch Colquitt, Governor of the State of Texas, by the delivery to them and each of them of a certified copy of this order, in conformity with the provisions of Section 266 of the Judicial Code of the United States.

In Chambers, at Fort Worth, Texas, this Nov. 6, 1914.

EDWARD R. MEEK,
United States District Judge.

26 *Defendants' Answer.*

Filed November 13th, 1914.

In the District Court of the United States for the Northern District of Texas, at Dallas. In Equity.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

The Answer of Ben F. Looney, the Attorney General of the State of Texas, and F. C. Weinert, Secretary of State of the State of Texas, the above-named defendants to the Bill of Complaint exhibited against them by the above-named Complainant.

These Defendants now and at all times hereafter saving and reserving to themselves any and all manner of benefits and advantages of any motion which they may have or may hereafter file herein relative to the right of the Complainant to maintain this suit, or to have a hearing thereon at this time, and relative to the imperfections and insufficiencies in Complainant's said Bill of Complaint contained, for answer thereunto or unto as much or such part thereof as these defendants are advised that it is material and necessary for them to answer unto, answering say:

1.

The plaintiff can not maintain this action against these Defendants or either of them, for the reason that this is a suit in effect against the State of Texas in violation of the Eleventh Amendment to the Constitution of the United States; and because the State of Texas has not given its consent to be sued in this cause, or its consent that this suit be brought against these Defendants. That this suit is brought against these Defendants as Attorney General and Secretary of State, respectively, of the State of Texas, to restrain them in the performance of their official duties under valid and constitutional laws of the State of Texas, and as such is in effect a suit against the State of Texas inhibited by the Constitution of the United States, and inhibited by the fundamental law of sovereignty without the State's consent, which has not been granted.

Defendants pray that the action for this reason stated be dismissed.

27 2.

The Plaintiff cannot maintain this action for the reason that there is no equity in its Bill of Complaint in this:

That the same discloses that Plaintiff is engaged in intra-state commerce within the State of Texas, and that all the actions alleged to be in contemplation by the Defendants are legal and proper under

the Constitution and laws of the United States and of the State of Texas.

Defendants pray that the action be dismissed for want of equity in the Bill.

3.

Defendants admit that the facts stated in Paragraph 1 of Complainant's Bill are true.

4.

As to the statement of the purpose of this suit contained in Paragraph 2 of Complainant's Bill, these Defendants are without knowledge, except as contained and shown in Complainant's Bill itself.

5.

The facts set forth in Paragraph 3 of Complainant's Bill, as to its corporate powers and relative to the history of its incorporation and change of name finally to the Crane Company, are true.

6.

As to the facts set forth in Paragraph 4, relative to the capital stock and surplus of Complainant and the value of its property, the Defendants are without knowledge; however, if the facts there stated, as to the capital and surplus, are correct, then the amount of permit fees and franchise tax, as required under the laws of Texas, are correctly stated in said paragraph.

7.

As to the statements of fact contained in Paragraph 5 of Complainant's Bill, Defendants are without knowledge.

28

8.

The statements of fact contained in Paragraph 6 of Complainant's Bill, as to the location of its principal office in the City of Chicago, State of Illinois, and the transaction of its corporate business there with the location of the various officers named in said paragraph at said principal office and as to the holding of its corporate meetings at said principal office, and the transaction generally of its purely corporate business at said principal office, the Defendants admit are true; relative to the statements contained in said paragraph, to the effect that the results of Complainant's business everywhere are assembled in accounts kept at the Chicago office, and that the books there kept are the only books of accounts that disclose the result of all the Plaintiff's business operations, these Defendants are without knowledge.

9.

The statements made in paragraph 7 of Complainant's Bill, to the effect that it has for the purpose of facilitating the transaction of its inter-state business and its commerce with foreign nations, and in

order to more conveniently serve those with whom it has transactions in such commerce established agencies at the various points named, these Defendants have no knowledge; save and except that these Defendants know that the Complainant corporation has an office and principal place of business in Texas in the City of Dallas, Dallas County, at which office it is and has been doing business in the State of Texas by virtue of a permit granted it by the State of Texas on the 16th day of January, A. D. 1905; but the Defendants deny that the sole purpose of the Plaintiff in establishing its place of business and office in the City of Dallas, Dallas County, Texas, was to facilitate the transaction of its inter-state business and its commerce with foreign nations, but says, on the contrary, that its purpose in so doing was "to do business in the State of Texas to the extent and for the purpose as follows, to-wit: a manufac-
29 turing business, such as the manufacture of all kinds of steam, gas, water, oil, mine, milling, factory, engineers', railroad, hardware and builders' supplies and material, and agricultural machinery and supplies, and for the purchase and sale of such goods, wares and merchandise used for such business." That its purpose in establishing its Dallas office, as aforesaid, was the transaction of intra-state business within the State of Texas, in which business it has been and is now actively engaged.

10.

As to the statements contained in Paragraph 8 of the Bill, to the effect that the Plaintiff when it established its agency at Dallas in 1904 did not at once apply to the State for a permit, Defendants are without knowledge; and as to the reasons there stated for not so applying for a permit on the part of the Plaintiff, these Defendants are without knowledge; as to the character of business then being conducted by Plaintiff these Defendants are without knowledge; but as to the statements contained in said Paragraph 8, to the effect that the business now being transacted by the Plaintiff, and which has been transacted by it since it did obtain a permit to transact business in Texas on the 16th day of January, A. D. 1905, was or is inter-state commerce and such other transactions as are incidental and so closely related thereto as that either in whole or in part they can not be separated from the inter-state business of the Plaintiff without burdening such commerce and rendering the conduct thereof more expensive and less convenient, these Defendants say the same are not true; but that in addition to the inter-state commerce transacted by Plaintiff that the Plaintiff has, during all of said time and is now, engaged within the State of Texas in the transaction of intra-state commerce as permitted and authorized by its permit to transact business in this State, and that such intra-state commerce now being engaged in by Plaintiff and in which it has been engaged since it obtained a permit to transact business in this State, is not incidental nor so closely related to its inter-state commerce as that it
30 can not be separated from Plaintiff's inter-state business without burdening such commerce. The Defendants say that, as

a matter of fact, the Plaintiff has had for many years and now has and maintains a large storage room and mercantile establishment in the City of Dallas, in Dallas County, and a large storage room and mercantile establishment in Texas City, Texas, under the management of a general agent and representative, for the purpose of conducting an intra-state business, as it is authorized to do by the permit granted it by the State of Texas, and that it does conduct at all times an intra-state business in the articles of its own and other manufacture, as it is authorized and permitted to do by its charter and permit granted it by the State of Texas. That such intra-state business is no necessary part of its inter-state business, and that the same runs annually into many thousands of dollars in sales and profits.

11.

As to the facts stated in Paragraph 9, to the effect that at the time Plaintiff took its permit to transact business, on the 16th day of January, A. D. 1905, that the permit for a foreign corporation, such as was the Plaintiff, was $200.00, Defendants admit are true; but as to the purpose actuating the Plaintiff to take out said permit the Defendants have no knowledge, save and except that contained in Plaintiff's application for a permit to do business in the State of Texas, dated the 6th day of January, A. D. 1905, signed Crane Company, by R. T. Crane, President, and A. F. Bennett, Secretary, acknowledged by said parties before R. B. Stiles, Notary Public, on the 6th day of January, A. D. 1905, and filed in the office of the Secretary of State of the State of Texas on the 16th day of January, A. D. 1905, was granted by the Secretary of State to Crane Company, authorizing it to do business in the State of Texas to the extent and for the purposes hereinbefore set forth. Upon information contained in this application the Defendants state that the motive actuating Plaintiff in obtaining said permit was to do an intra-state business within the State of Texas, under the laws of the
31 State of Texas, and in the manner set forth therein.

12.

As to the statement made in Paragraph 10 of Plaintiff's Bill, to the effect that its purpose in purchasing a certain lot and constructing a certain building in the City of Dallas was that it might more economically and conveniently conduct its inter-state business and the transactions incident thereto these Defendants say that the said statement is not wholly true, but that one of its purposes was to aid it in the conduct and operation of its intra-state business, or business wholly within the State of Texas, for the transaction and conduct of which it had been granted a permit by the State of Texas.

As to the alleged facts in said Paragraph 10 relative to the amount paid for said lot, the cost of the building placed thereon, the manner of its construction and the permanency of said investment, and as to the effect that the same cannot be liquidated into money without involving a ruinous sacrifice and difference between the reasonable cost of said improvements and what they would be valued at in the sale of said property these Defendants are without knowledge.

13.

As to the facts alleged in Paragraph 11 of the Plaintiff's Bill these Defendants are without knowledge.

14.

As to the facts set forth in Paragraph 12 of Plaintiff's Bill these Defendants are without knowledge.

Relative to and concerning the facts alleged in said Paragraph 12 to the effect that the stock carried by Plaintiff at its warehouses in Dallas and Texas City consists for the most part of original packages and that about seventy-five per centum of the goods shipped out by Plaintiff from its warehouses are shipped in unbroken packages, these Defendants, as just alleged, are without knowledge, but they say if the statement is true, as made, then that such original and unbroken packages are first shipped by Plaintiff to its said
32 offices and places of business at Dallas and Texas City to be placed in its stock of goods carried at said points and not for sale or delivery to any previously ascertained or particular purchasers; but are shipped to be placed in its stocks of goods, as aforesaid, and exposed and held for sale to jobbers throughout the State of Texas, and are commingled with its other goods there held and exposed for sale, to be shipped either in broken or unbroken packages, as the quantity ordered by its customers might determine or require; that the plaintiff's store rooms and mercantile houses are the destination of all such goods, and that they are shipped there for the purpose of repacking, separation, distribution and sale, either in broken or unbroken packages, as the size of the orders received might permit or require; and that being so shipped and placed and exposed for sale in such packages, to be sold as the exigencies and demands of business might require such articles so placed in unbroken packages become mingled with and are a part of the common stock and general body of property of this state and subject to the laws and power thereof, losing their character thereby of inter-state commerce, if such was ever their character, under the manner and method of business so transacted by the Plaintiff.

15.

As to the facts stated in Paragraph 13 of Plaintiff's Bill, relative to the number of its traveling salesmen and the method of operation, and as to the amount of business there stated to be done in the manner set forth, these Defendants are without knowledge; save and except these Defendants say that the Plaintiff's travelling salesmen solicit intra-state business for the Plaintiff and that Plaintiff through said salesmen does a large intra-state business, or business originating within and consummated wholly within the State of Texas, in goods which are not inter-state commerce.

16.

The statement made in Paragraph 14 of Plaintiff's Bill, to the

effect that it maintains a warehouse at Texas City is true,
33 but Defendants say as to the number of employees and the amount of Plaintiff's business incident to its business conducted at Dallas and Texas City, or as to the net profit therefrom, or as to the character of its investment, these Defendants are without knowledge.

17.

The facts stated in Paragraph 15 of Plaintiff's Bill the Defendants say are true, except that the permit tax alleged was its original permit fee previously referred to.

18.

The statements contained in paragraph 16 of Plaintiff's Bill, as to the laws of the State of Texas, are substantially true; as to the conclusion of the pleader therein stated to the effect that classifications of corporations for the purpose of taxation and of permit fees as therein stated are arbitrary and fanciful and deprive the Plaintiff of the equal protection of the law the Defendants say the same are merely conclusions of the pleader, but as such are incorrect. Defendants say that the classifications above referred to are reasonable, proper and lawful classifications and in no manner deprive the Plaintiff of the equal protection of the law.

19.

The statements contained in paragraph 17 of the Plaintiff's Bill, relative to and concerning the laws of the State of Texas are substantially true, as to the substance of the law.

20.

The statements concerning the laws of the State of Texas contained in Paragraph 18 of Plaintiff's bill are substantially true, in so far as the same states the substance of the laws referred to.

21.

As to the facts stated in Paragraph 19 of Plaintiff's Bill these Defendants are without knowledge.

22.

As to the statements made in Paragraph 20 of Plaintiff's
34 Bill, to the effect that upon the expiration of its present permit granted by the State of Texas it will not again apply for a permit, nor pay the fees therefor, nor file the affidavits required, and that it will not, at the expiration of its present franchise tax, pay another franchise tax, these Defendants have no knowledge.

As to the allegations in said answer, to the effect that unless the Plaintiff takes out a permit to transact business in Texas on or after January 15, 1915, and unless it pays the franchise tax specified by the statute at the expiration of its franchise tax on May 1, 1915, that

the defendant F. C. Weinert, as the Secretary of State of the State of Texas, will undertake to forfeit on the books of his office the right of the Plaintiff to do business in Texas and will bring this fact to the attention of Plaintiff's debtors and to the notice of every person having a claim against the Plaintiff and will issue certificate to that effect to such persons these Defendants say:

That Plaintiff's permit to transact business in the State of Texas will expire on the 15th day of January, A. D. 1915, and that its rights under its franchise tax heretofore paid will expire on May 1, 1915; that upon the expiration of its permit, to-wit, on the 15th day of January, A. D. 1915, the Defendant F. C. Weinert will not undertake to forfeit on the books of his office the right of the Plaintiff to do business in Texas, nor will he do so at any time thereafter unless and until another permit is granted the Plaintiff and a cause for forfeiture should arise; that he will not, nor is he required by law, to bring such alleged fact of forfeiture or of the expiration of Plaintiff's permit to the attention of the Plaintiff's debtors, nor will he bring notice thereof to the attention of any person having a claim against the Plaintiff, nor will he issue any certificate of forfeiture to any such person; the Defendants say that it would be said Weinert's duty, as Secretary of State of the State of Texas, and he would issue a certified copy to any person entitled thereto of the Plain-
35 tiff's permit to transact business in the State of Texas and that such certified copy would show for itself the date of granting and expiration of the same, and that he would not be authorized by law, nor would he after its expiration forfeit the same or mark the same as forfeited, but that the rights of the Plain-
36 tiff, if any, under the same, would expire ten years after the date of its issuance, to wit, ten years after the 16th day of January, A. D. 1905, and that said Weinert's action thereon as Secretary of State and his authority thereover would after said date be limited wholly to issuing a certified copy thereof to any person who might require the same and who might have a right to the same. The Defendants show that the said Weinert could not forfeit said permit for a failure to pay the franchise tax, as alleged by the Plaintiff, for the reason that such franchise tax is already paid to a date extending beyond the expiration date of the permit, and that therefore he could and would take no action as Secretary of State under any statute authorizing him, the said Weinert, as Secretary of State, to forfeit said permit for failure to pay the franchise tax on or after May 1, 1915; that the said Weinert's duty, as far as the franchise tax is concerned, would be to issue to all who might be entitled thereto a certificate showing the date of the last payment made by Plaintiff of its franchise tax.

Defendants say further that in the event Plaintiff did not apply for a permit to transact business in this State, after the expiration of its present permit, that said Weinert would not be authorized to receive, nor would he receive, any franchise tax from the Plaintiff, nor issue to the Plaintiff a receipt for such tax, as such tax is due only from those corporations lawfully transacting business in the State, and he would not be authorized by law, nor would he collect from the

Plaintiff any franchise tax, except and until it obtained a permit to transact business in the State of Texas.

37 Defendants say further that the said F. C. Weinert, Secretary of State, is not authorized to, nor will he take any action as Secretary of State of the State of Texas against or relative to the Plaintiff because of the transaction by it of interstate commerce business in the State of Texas.

23.

Answering further the allegations made in paragraph 20 of Plaintiff's Bill to the effect that the defendant, B. F. Looney, Attorney General, will institute a suit or suits against Plaintiff for collection of penalties for non-payment of franchise taxes and to oust it from doing business in Texas, and that both the defendants will harass, annoy and impede Plaintiff in the transaction of interstate commerce, as set forth therein, these defendants each deny that either of them will do as charged, for that they say:

On the — day of —— A. D. 1914, the State of Texas, acting by and through B. F. Looney, its Attorney General, filed suit in the District Court of Limestone County, State of Texas, against the Plaintiff herein, Crane Company, for the statutory penalties for violating the Anti-Trust Laws of the State of Texas, for cancellation of its permit to transact intrastate business within the State of Texas, and for an injunction forever enjoining it from doing any business other than interstate business within the State of Texas, which said suit is now pending and being actively prepared for trial and which will be tried as soon as the taking of testimony may be finished and the parties acting with due diligence be ready for trial; that if the contention of the State in said suit be sustained, the Plain-

38 tiff's permit to transact intrastate business in the State of Texas will be cancelled and annulled and it will, under the laws of Texas, be forever enjoined from transacting other than interstate business within the State of Texas. That during the pendency of said suit no other suit will be filed by the defendant, B. F. Looney, Attorney General, to oust the Plaintiff from transacting intrastate business in this State for a failure to pay franchise taxes or for a failure to obtain a permit to transact intrastate business in this State, for under the allegations of the State made and insisted on in said suit a permit could not lawfully issue to the Plaintiff or franchise taxes be lawfully received from it, as the State's contention is that the Plaintiff can not in any event be lawfully granted authority to transact intrastate business in the State of Texas.

39 The defendants say that the issues in said suit go to a determination of the right of the plaintiff to transact intrastate business in Texas under any circumstances, and until this issue has been determined no action will be taken by the said defendant, Ben F. Looney, Attorney General of Texas, against the plaintiff for failure to obtain a permit for failure to make statutory reports or pay its franchise taxes. That if the State's contentions in said suit be sustained the plaintiff will be forever barred from transacting intrastate business in the State of Texas, and no further action will lie against it, and no action will be taken by the State or the defendant

Ben F. Looney, Attorney General, until this anti-trust suit has been finally determined.

If the State should not be successful in said suit, and it be determined that the plaintiff has the right by complying with the law, to transact intra-state business in Texas, then these defendants say that the said Looney will not bring any suit for penalties against the plaintiff nor to exclude it from the State for failing to take out a permit under the law, until and after a failure and refusal of the plaintiff to take out a permit and pay the franchise taxes after a determination of said anti-trust suit in its favor. For these reasons the defendants show there is no necessity of any temporary or other restraining order or injunction in this case; and that the case should either be dismissed or postponed awaiting the result of said anti-trust suit and the determination of plaintiff's right in any event to transact intra-state business in the State of Texas; that said Court in said suit having assumed and taken jurisdiction of the matters in controversy between the State of Texas and the plaintiff of and concerning its right to transact intra-state business in the State of Texas under a permit granted by the State, its jurisdiction is exclusive, and the same is not now subject for determination by this Court.

40 Wherefore, the defendants pray:

1st. That the Bill filed herein by the Plaintiff be dismissed for want of equity.

2nd. That the same be dismissed because the suit is brought in violation of the eleventh amendment to the Constitution of the United States, and because the State of Texas has not given its consent that this suit be brought.

3rd. Or that this suit be postponed awaiting the result of the anti-trust suit between the plaintiff and the State pending in the District Court of Limestone County, Texas.

4th. Or if this Bill be not dismissed or postponed, then that the Plaintiff take nothing by its suit and that no injunction, either interlocutory or permanent, be issued against the defendants, F. C. Weinert, Secretary of State, and Ben F. Looney, Attorney General of the State of Texas; that these defendants each recover of the Plaintiff the costs respect*fully* incurred and for such other and further relief as they each may be entitled to in the premises.

B. F. LOONEY,
Attorney General;
F. C. WEINERT,
Secretary of State of the State of Texas,
Defendants.

By B. F. LOONEY,
Attorney General;
C. A. SWEETON,
C. M. CURETON,
Assistants Attorney General,
Solicitors for the Defendants.

41 STATE OF TEXAS,
County of Travis:

Before me the undersigned authority on this day personally appeared B. F. Looney, Attorney General of the State of Texas, who being by me duly sworn upon oath deposes and says that he is Attorney General of the State of Texas, and one of the defendants in the above answer, and that he is solicitor for his co-defendant F. C. Weinert, Secretary of State, named above; That he is cognizant of the facts set forth in said answer, and the same are true in substance and in fact, and further affiant saith not.

B. F. LOONEY.

Subscribed and sworn to by B. F. Looney, before me this the 12th day of November A. D. 1914.

Witness my hand and official seal on the date last above written.

[SEAL.] W. P. DUMAS,
Notary Public in and for Travis County, Texas.

42 *Complainant's Amendment to Bill.*

Filed November 13th, 1914.

Amendment to the Bill.

In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2782.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

Comes now Plaintiff and prays for an order permitting it to file the amendments to its original bill which are hereto attached, and as in duty bound it will ever pray.

ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for the Plaintiff.

Permission is hereby granted plaintiff to file the amendments to its bill attached to the foregoing application.

Fort Worth, Texas, November 13, 1914.

43 In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2782.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

1.

Insert at the foot of paragraph 14 of the bill the following:

14 (*a*). During the ten years last past the plaintiff's business has been conducted substantially in the matter set forth in the 12th, 13th and 14th paragraphs of the bill. That the volume of the business has increased in some years and decreased in other years, but the proportions as set forth in said paragraphs of the bill have substantially maintained during the whole of said time and during no year has the plaintiff's business in Texas been of greater volume than that shown for the year 1913 in the said paragraphs of the bill.

That at no time has the plaintiff ever done or proposed to do or contemplated doing a manufacturing business in Texas, but on the contrary the whole of its business in Texas, or that has had
44 any territorial relation to Texas, has been the buying and selling of goods, wares and merchandise, and that the whole of said business has been commerce, and none of it has been the business of manufacturing.

2.

20 (*a*). That the defendant F. C. Weinert, Secretary of State will, after the 15th day of January, 1915, unless restrained, deliver to any one requesting the same a certificate showing the date of the last payment made by plaintiff of the franchise taxes; that this certificate will show that the last payment made by plaintiff was made on the first day of May, 1914, and only covered the fiscal year ending May first, 1915; that said certified copy of the permit and certificate of the payment of the franchise taxes will disclose and will be evidence in any suit by or against the plaintiff in the courts of the State of Texas to the effect that plaintiff, under the pretended laws of the State of Texas has no authority to maintain such suit as may be instituted by it or to defend such suits as may be brought against it unless this law suit is one to oust it from doing business in the State of Texas; that the issuance of such certificates will embarrass, harrass and annoy the plaintiff in the prosecution and defense of its suits in the State of Texas, a large number of which suits will necessarily arise in the conduct of its business with residents of the State of Texas, which must be litigated, if at all, in the courts of said state,
45 so far as plaintiff is the actor of the said suits and suits in which plaintiff is defendant, although they might be brought in other courts than those of Texas, will be brought against the plain-

tiff in the courts of Texas; that the remedy that plaintiff would have in such suits respectively to plead unconstitutionality of the statutes which it attacks in this bill, would be inadequate and would not afford to plaintiff that convenient, adequate and sufficient remedy which this court could award by the issuance of its injunctive progress.

22 (*a*). Plaintiff avers that under the said pretended laws of the State of Texas, its permit will automatically expire on the 15th day of January, 1915; that thereby, without any judicial or other declaration of forfeiture, its right to do business in Texas, will cease and thereupon it will become and be liable for all of the incidents ensuing from the cessation of said permit as prescribed by the said pretended laws of the State of Texas; that upon the cessation of said permit the said defendant F. C. Weinert, as Secretary of State will give certificates to all parties asking the same certifying the fact of the cessation of the permit — will in itself constitute a declaration of the forfeiture of plaintiff's right to do business in Texas, and said certificate will be under the pretended statutes of the State of Texas, evidence of that fact.

46 3.

Following the conclusion of paragraph 22 of the original bill, add paragraph 22 (*a*), as follows:

22 (*a*). Plaintiff prays that the defendant F. C. Weinert, as Secretary of State be enjoined from issuing at any time and especially on and after January 15, 1915, any certificate evidencing the fact that plaintiff's permit has expired or evidencing the fact that plaintiff has failed or refused to obtain a new or additional permit beginning January 15, 1915, and that the defendant F. C. Weinert as Secretary of State be enjoined from preparing, circulating or furnishing to any one whomsoever, on or after May first, 1915, any certificate showing that plaintiff has failed or refused to pay or to obtain any further or other franchise tax receipt and that he be restrained from preparing, circulating or furnishing to any person whomsoever either certified copies of plaintiff's pretended permit to do business in Texas or of its franchise tax, license or receipt paid on May first, 1914.

ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Plaintiff.

47 STATE OF TEXAS,
County of Tarrant:

Before me, the undersigned authority on this day personally appeared James E. Ludlow, who being duly sworn, says on oath, that he is agent for Crane Company, a Corporation, the plaintiff in the foregoing bill; that he is cognizant of the facts set forth in the above and foregoing amended bill, upon which, as well as upon the original bill the relief therein is asked, and that the facts therein set forth are true in substance and in fact. And further affiant saith not.

Subscribed and Sworn to before me by the said J. E. Ludlow, on this the 13th day of November, 1914.

——— ———.

48 *Defendants' Supplemental Answer.*

Filed November 16th, 1914.

In the District Court of the United States for the Northern District of Texas, at Dallas. In Equity.

No. 2782.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

Come now the defendants and pray for an order permitting them to file the attached amendment in supplement to their original answer and in reply to the plaintiff's amendments filed herein; tendered for filing at this time in accordance with an agreement made in open court at the time of the trial of the case.

B. F. LOONEY,
Attorney General;
C. M. CURETON,
C. A. SWEETON,
Assistants Attorney General,
Solicitors for the Defendants.

Permission is hereby granted to file the attached supplement.

49 In the District Court of the United States for the Northern District of Texas, at Dallas. In Equity.

No. 2782.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

In answer to the amendments filed by the plaintiff herein the defendants come and say:

1. That as to the facts stated in paragraph numbered 14 (*a*) of said amendments the defendants are without knowledge.

2. As to the facts set forth in paragraph 20 (*a*), the defendants are without knowledge, save as to the payment of franchise taxes there referred to; as to the conclusions of law, the defendants refer to their original answer and the statutes of the State.

3. As to the conclusions of law stated in paragraph 22 (*a*) the

defendants refer to and rely on their original answer, and the statutes of Texas.

B. F. LOONEY,
Attorney General;
C. A. SWEETON,
C. M. CURETON,
Assistants Attorney General,
Solicitors for Defendants.

50 STATE OF TEXAS,
County of Travis:

Before me, the undersigned authority on this day personally appeared B. F. Looney, Attorney General of the State of Texas, who being by me duly sworn upon oath deposes and says that he is Attorney General of the State of Texas, and one of the defendants in the above answer, and that he is solicitor for his co-defendant F. C. Weinert, Secretary of State above named; that he is cognizant of the facts set forth in said answer, and the same are true in substance and in fact, and further affiant saith not.

B. F. LOONEY.

Subscribed and sworn to by B. F. Looney, before me this the 14th day of November A. D. 1914.

Witness my hand and official seal on the date last above written.

[SEAL.]

D. P. DUMAS,
Notary Public in and for Travis County, Texas.

51 *Bill of Exceptions.*

Filed January 12th, 1915.

In the District Court of the United States for the Northern District of Texas.

No. —. In Equity.

CRANE COMPANY
v.
BEN F. LOONEY, Attorney General, and F. C. WEINERT, Secretary of State.

Bill of Exceptions.

Be it remembered, that on the 13th day of November, 1914, the above entitled cause came on for hearing, before Honorable Richard W Walker, Circuit Judge, and Honorable Rhydon M. Call, District Judge for the Northern District of Florida, and Honorable Edward R. Meek, District Judge for the Northern District of Texas.

The Complainant appearing by Messrs. Etheridge, McCormick & Bromberg, its counsel, and the defendants appearing by Messrs.

C. M. Cureton, and Clyde A. Sweeton, their counsel, the following proceedings were had and evidence introduced, as follows:

52 The Complainant called as a witness J. E. LUDLOW, who after being duly sworn, testified as follows:

Testimony of J. E. Ludlow.

My name is J. E. Ludlow; I live at Dallas, Texas, I am local manager of the Texas Branch of Crane Company; I have occupied that position for ten years; my office is at Dallas, Texas.

The capital stock of Crane Company is Seventeen Million Dollars. I have a memorandum here showing the amount of its surplus and undivided profits to be Eight Million One Hundred and Thirty-Nine Thousand ($8,139,000) Dollars. I have been connected with Crane Company for fourteen years; I was with the company before they opened an agency at Dallas. Crane Company has been engaged in the business of shipping goods into Texas on orders sent to it from Texas, to my own personal knowledge about nineteen years. Before the office was opened in Dallas the business was conducted by having two salesmen from the Saint Louis office travel
53 over the state and solicit business, and they also received a great deal of business direct by mail, or telegram; that is customers would send in orders to either the Saint Louis or Chicago houses, and the orders would be filled from there and the goods shipped into Texas. In 1904 Crane Company established an agency in Dallas, Texas. Since that time our business has been done through the Dallas Branch. That business consisted of merchandise, such goods as we ourselves manufacture at Chicago—the piping and tubing comes from Pittsburg, Pennsylvania, and miscellaneous plumbing goods in the way of bath tubs and all sorts of plumbing fixtures and steam goods come from various parts of the country. We handle these articles as jobbers. In 1913, our stock of goods in Dallas amounted to $163,277 in merchandise. That would vary somewhat from time to time, but not materially. We made shipments from that stock in the following manner; take piping, for example: All sizes of pipe up to and including one and one-half inch came to us in bundles, containing from three to seven pieces to the bundle; all sizes larger than that come to us in pieces, usually billed out at so many feet per piece. Bath tubs,
54 lavatories and practically all of the plumbing fixtures as well as their trimmings come to us done up in bundles which we don't have to break in order to complete an order—do not have to change it, in other words, from the way we receive it. Goods which we ourselves manufacture, with the exception of the smaller pieces—and by that I mean two inches and smaller, or individual pieces, when we receive a carload of goods from Chicago, it is put loose in the car and we handle it that way; we ship it out the same way we receive it. Approximately seventy-five per cent of the business we do from our Dallas and Texas City Stock is shipped in the same shape in which we receive it. During the year 1913, $649,136 of business was done through our Dallas and Texas City houses,

in the way I have indicated. Approximately one-fourth of the business is sold in broken packages and three-fourths of it in unbroken packages. We have nine traveling salesmen in Texas, two of them being confined strictly to Dallas, though all of them are in
Texas. These salesmen sell, or take orders, for anything
55 that we give them a price on, for shipment either out of
Dallas or Texas City stock, or direct from the factories. If the articles ordered from the factory are such that they can make price on advantageously to the men they are trying to sell to, they take these orders and send them to us at Dallas and we order the material shipped from whatever source it is most advantageous; if it is from the factory, we order it shipped direct from the factory; if it is ordered to be shipped from Dallas or Texas City we ship it from those points. If it is not to be shipped from there, we send the order to the source of supply to make shipment, from such and such a point to such and such a point. In event we don't send it from the Dallas or Texas City stock, the article goes direct to the purchaser from the point of shipment—that is, it does not come to Dallas or Texas City and then reshipped, but the goods are shipped direct from the point of shipment to the purchaser. These traveling salesmen transact no business except for the Crane Company; that is, they handle no other goods except orders that are billed from Texas City or Dallas, or to be forwarded by our Dallas house
to some factory or other concern, or source of supply outside
56 of the state. That is, they send no orders directly outside
of the state; they send them to us at Dallas.

The gross sales of Crane Company, everywhere, for the year 1913 amounted to $39,831,000; in 1913 Crane Company did a business of $1,019,750 in the state of Texas through the Dallas office; $200,638 was shipped direct from Chicago; by that I mean that Crane Company, Chicago, ordered from the pipe mills at Pittsburgh or from various concerns of supply; the Kansas City branch shipped $16,766; that is in addition to what I have stated before. The Birmingham branch shipped $11,210; Crane Company, Chicago, shipped $142,000, or $370,614 of the business was not handled by the Dallas branch at all; that is, that amount went through other branches direct to Texas; that is, the Chicago, Kansas City and Birmingham orders never came through Dallas at all. All these shipments that did not come from Texas City and Dallas, came into the state from points outside of the state—every one of them. The Crane Company has never conducted any manufacturing business in Texas; we do manufacture some goods in our northern plant. We manufacture valves and fittings incidental to steam, water and gas,
57 and these are shipped to the different agencies over the country; in addition to that we buy quantities of other goods of other manufacturing concerns and they are also shipped from state to state. I think Crane Company also has two houses in Canada. I have some memoranda by which I can tell where the different houses of Crane Company are located; however the list given in the bill of complaint in this case is correct, to my own knowledge; it is on page 5, of the bill.

I don't know any better way to describe the building in which we do business in Dallas than to state that it is the strongest building in Texas. It is situated on a lot 110 x 197 feet and cost thirty thousand dollars; it was built in 1906, if I recall correctly; the building is brick and concrete and fireproof; it has a carrying capacity of 700 pounds on the first floor and 500 pounds on the second floor and 200 pounds on the balance. By that I mean to the square foot. It is five stories and basement; I don't know of any other business that would require so strong a building as it is. The general details of its construction were worked out by our superintendent of buildings in Chicago, after years of experience as to what we would re-
58 quire; it is particularly adapted to our business. In case of a sale of that property I do not believe we could realize the extra cost of it. It is connected with the main line of the Gulf, Colorado and Santa Fe Railroad, the "Frisco" railroad and the Rock Island railroad.

In 1913 the Crane Company had property in Texas valued at $301,179 consisting of cash, $4,500.00; real estate, $30,000; buildings $91,520; furniture and fixtures $11,882; merchandise $163,277; merchandise and furniture and fixtures includes the Texas City Stock as well as the one in Dallas. We use this house and these facilities exclusively for the handling of our business—business of Crane Company. We don't use any different part of the property for filling local orders from that part used for filling orders to go outside of the state. We have something over forty employes in the house at present—forty-two or forty-three; they consist of salesmen, bookkeepers, stenographers, bill clerks, shipping clerks, teamsters and myself, as manager. This force is not divided up into those who do the local business and those who do business outside of the state; they are all used indiscriminately. The Dallas house was built primarily for the purpose of increasing the distribution
59 of goods which we ourselves manufacture at our no-thern plants; in connection with that distribution we have also continued to handle goods of other manufacturers. We have salesmen traveling throughout the state for the purpose of taking orders for that business. Some of that business is on orders sent outside of the state; some of it is filled in unbroken packages and some is filled by shipments of broken packages.

Q. What effect would it have on the interstate portion of your business, or business passing over the state line—what effect would it have on that business if the Crane Company could not do a broken package business out of the Dallas house.

Mr. Cureton: I desire to suggest to the court that that testimony is not admissible; I simply want to call the attention of the court to it.

Judge Walker: The objection will be noted.

The Witness: The Crane Company could not do the volume of business they have done since it has been in the state with the branch house, at a profit; it would be at a loss; I say that because I am familiar with all the costs of doing business in the state and know what

our gross profits are; if we didn't have business that we could
60 ship direct from our own or other factories that we handle on a smaller margin of cost than we do that which we have in Texas City and Dallas, we could not make our expenses. If we were cut off from doing the interstate part of our business we could not make expenses of handling our local business—not on the business we do. It is beneficial to our business to be placed where we can supply purchasers with goods in broken package for local distribution; if that was withdrawn from our general business I don't see how we could maintain a house in the state—could not do business in the state. It would be hurtful to the interstate business to withdraw our privilege of doing a local business—selling out of broken packages. Our gross profits for the year 1913 were 20.13 per cent of our total business in Texas from the Dallas house. If we charge five per cent on the investment on real estate, building and fixtures, our net profit would be 5.18 per cent. The average profit for the past nine years has been—gross, 19.48; net, 4.47½ per cent.

In the 15th paragraph of our bill, on page 11, is a statement of the franchise taxes paid by the Crane Company, 1904 to 1914,
61 inclusive; the statements therein contained are correct; we have paid the amounts for the several years as shown for franchise taxes. We also paid ad valorem taxes on property situated in Texas. In 1913 we paid the city of Dallas $4,094.88; to the State and county, $2,082.50. The total amount of ad valorem paid on Crane Company property in the state of Texas for the year 1913, was $6,202.38. When we took out a permit to do business in the state of Texas in 1905, we made payment then of $200. I have testified as to the amount of taxes paid for the year 1913; the 1914 figures have not yet been assembled; 1913 figures are the last ones available. The figures I have given for the year 1913 are fairly illustrative of the amounts paid for the last ten years, I believe.

On cross examination the witness testified:

I stated that the average profits of Crane Company for the past nine years was: Gross, 19.48; net, 4.47½ per cent. That comprehends the entire nine years. The net profit in 1913 was 5.18 per cent. I stated that the house and lot in Dallas cost in the neighborhood of $120,000; I doubt if it could be sold for that amount of money now. It is located on Jackson street; it is located
62 adjoining the passenger station of the Gulf, Colorado & Santa Fe Railroad; it is not near the heart of the business district of the city of Dallas—it is just off of the heart of the city. It is not near the wholesale district—it is two or three blocks from the wholesale saddlery district; it is true that it is close to the Southland Hotel, one of the largest hotels in the city; it is very near the Oriental Hotel and about the same distance from the Adolphus. The Union Depot Company, of Dallas never offered us more than $120,000 for it; they never made us an offer.

Mr. McCormick (for the complainant): Pardon me; there is one point I did not cover: The Crane Company has to bring some suits on accounts, for collection, now and then?

The Witness: Yes, sir.

Mr. McCormick: During your experience as manager for the Crane Company at Dallas, about what per centage of claims that have to be litigated amount to as much as $3,000?

The Witness: Over ninety per cent is less than $3,000.

Continuing cross examination the witness said:

This building, to which I referred is constructed for the
63 handling of goods in original packages. We keep large quantities of goods there in the same packages in which they are shipped to us; we also keep large quantities of goods there in broken packages on our shelves; those in the packages in which they were shipped and those in broken packages are placed on the shelves in the store room for sale to the public—on the shelves and throughout the house. If we receive a carload of bath tubs for instance properly crated, we place them in the house to sell to any person who may come there for send in their order. The uncrated goods are placed in our store room, and when placed there, ordinarily are not goods that have been ordered by particular parties, but ordered by us to maintain our stock and keep it on hand for sale to the trade.

A crate containing a bath tub does not contain anything else; the fixtures and smaller articles that go to complete the tub do not come in the crate; the chain, rubber stopper and parts that go to make it complete—waste and overflow, are not in the original package, but in separate packages. The valves, which let the water in, those are all in separate packages—not in the original package, but

in a different package entirely. These are brought to our
64 store and placed there—they are placed in the ware house, we don't expose them for sale, much. We sell to people throughout the state who deal in that character of wares. We don't do a retail business, we do a wholesale business; our store should be considered more as a warehouse than anything else. When goods are shipped to our house at Dallas they are not paid for by our house; they are paid for by our Chicago house; the bills are paid in Chicago for all merchandise that come to us. They are charged against the Texas business on the books of the company; they are not charged on our books; the Crane Company accounting department takes care of our accounts payable.

In addition to bath tubs and the various attachments that go with bath tubs, we handle steam fittings valves and things of that character. These goods are brought in with the balance of the goods in our house and sold to the public generally; that is, the public that we have dealings with generally. They are put in the house for that purpose; we manufacture valves; we don't manufacture steam engines; we don't manufacture pipe, we buy that; we buy all the pipe that we sell at Dallas; that does not come from our company, but from an independent company entirely; it comes

from the National Tube Company, Pittsburgh, Pennsylvania.
65 It is true that this pipe from the National Tube Company is sent to us on consignment. As a matter of fact we don't buy that, it is sent to us on consignment and we sell it to the trade in Texas generally, on commission; we are paid by a per cent for

our sales. With reference to our supply of sewer pipe: We buy that the same as any other merchandise, from various sources. We don't assemble that at the Dallas office, we sell it the same as we get it; we bring it and resell it—reship it; it is shipped as we receive it. The other pipe, as I stated, comes to us put up—up to and including an inch and a half in size, in bundles. This pipe comes to us in bundles and packages—it comes wired together and it is shipped and specified—billed, as a bundle. It is put up in bundles containing from three to seven pieces, according to the size, tied in three or four different places. That is put in the ware house and when a party orders it, it is shipped in the original package, original bundle. If an order calls for a little over or a little under, we send the bundle, so as not to break the package; if the order was too small, we would break the package, and send it; we keep that pipe there for that purpose. This house at Dallas is well constructed for the purpose of keeping goods there in the original pack-
66 age and selling in original packages; it is especially constructed for carrying such goods as we handle. The Texas house sold and shipped out from Texas something over $600,000 worth of goods last year—at Dallas and Texas City. Of that amount it is estimated that $163,000 worth, and a little over, was in broken packages; the balance was goods shipped in unbroken packages, taken out of the warehouse after they had been placed there in the manner I have just described; this $600,000 worth of goods from the Texas houses was shipped to our trade generally throughout Texas, on orders received by the house through mail, telegram or through our traveling solicitors. These traveling solicitors take orders for shipments of goods in broken quantities as well as in larger quantities. The practice of our company is, where a carload shipment is made to points outside of Dallas, to send the order to Chicago and have the shipment made from the point of origin direct to the point of destination, in order to secure the benefit of the common point rate. The carload order is sent in by us from Dallas, and is credited to the Dallas house. At the Dallas house we maintain machinery for cutting threads on pipe, when — receive orders of that character from our Texas trade. That machinery is operated by electricity; we have four machines of that
67 character; there are two men employed in that department.

I cannot tell you what quantity of pipe is threaded and shipped, except to say that it has never paid; I don't know the quantity; we do not cut and thread all the pipe we sell; of all the pipe we sell, we do not cut and thread three per cent of it. I can give you the amount of business that has been done by our company in Texas during the years since 1905, other than 1913, which I have already given you. In 1905 we did a business of $316,062; in 1906, a business of $452,443.24; 1907, $639,618.25; 1908, $381,-913.44; 1909, $509,523.67; 1910, $535,416.11; 1911, $632,689.77; 1912, $806,202.42.

In regard to the matter of cutting and threading pipe: If a man wants a piece of pipe a certain length and we don't have it that length, we cut it and thread it for him. The purpose of cutting and

threading it is to prepare it for our trade. We make a little charge for that service; the price varies with the sice of the pipe; there is a fixed discount that applies on these various prices.

The building at Dallas is five stories and basement. Our house is not the only one in the State of Texas engaged in that class of business; it is not the only one in Dallas. As to whether or
68 not our house and lot is one of the most desirable places for wholesale business in Dallas, I don't know how to answer that; it is desirable for our business. It is true that people have congratulated us on our facilities for handling business. It is not a fact that the Santa Fe Railroad Company owns the property adjoining our property. Our switching facilities are now in jeopardy, and without our switching facilities we would be isolated. I refer now to the fact that the Strickland people (Southern Traction Company) have purchased that property. I don't know that our people would sell that house and lot for $120,000 or $130,000; I don't know why they should. I think business property in Dallas has been selling for more than it is worth.

In shipping out this stuff in broken packages we crate it to a certain extent; we manufacture crates in a limited way, we have saws and hammers there. As to whether or not we conduct at Dallas and at Texas simply an ordinary wholesale business such as is conducted by other houses engaged in our class of business throughout the State of Texas, I will say that I have never done any business for any body else in Texas except Crane Company in the capacity of manager.

69 Mr. Cureton: But you know how people conduct their business, don't you?

The Witness: I am a little bit afraid to answer that now, on account of that anti-trust suit.

Mr. Cureton: I won't ask you at this time your source of information; I just want to know if you don't conduct your wholesale business about like everybody else?

The Witness: I believe we do our business different from any other concern in the United States. We are the only concern that I know of that will not pay a franchise permit tax as a foreign corporation; that is one way that is different; I don't say we are the only one; you asked me for some details and that is one of them. We buy and sell goods and ship them out in the state generally; I don't want to appear as doing it like other people. It is true that we do an open account business in Dallas, right over the counter; we sell to plumbers and users of steam goods. A part of our line we sell direct to the retail trade; we sell sewer pipe and little trinkets for insulating, &c., and that character of stuff to most anybody that comes in, inside of Dallas or outside of Dallas; we would not ask them where they were from, if they had the money to pay for it. If they send in an order, we sell it to them. We do solicit that
70 class of business throughout the state, to a certain extent; we do that about on the same plan that we make Dallas sales,—about on the same plan; that is, we sell to electric light plants, and such as that.

On redirect examination the witness said:

In the handling of this pipe on Commission, we operate under a contract between the Crane Company of Chicago and the National Tube Company of Pittsburgh, and handle it at all places on the same basis. We do not put threads on any pipe except that which we sell. If a man comes in and wants us to thread a piece of pipe for him, we do it; the threading machine is for the purpose of threading pipe that we ourselves sell.

In regard to the crates: We do not make crates for anybody except that which is incident to our business. As a matter of fact we buy most of our boxes.

There is an allegation in our bill to the effect that the gross receipts of the Crane Company and the gross sales are substantially the same. That is true, practically so.

Thereupon the plaintiff rested.

71 Thereupon, the defendants introduced in evidence as a part of the record in this case certified copies of the application made by Crane Company for a permit to transact business in the State of Texas and the permit issued to it on such application. These two instruments, so far as material to the determination of the issues in this case, are as follows, to-wit:

72 *Application for Permit to Do Business in the State of Texas.*

Crane Company, duly incorporated under the laws of Illinois, hereby makes application for permit to do business in the State of Texas.

1. The name of the corporation is Crane Company.

2. The permit it desires is for the business of a manufacturing business, such as the manufacture of all kinds of steam, gas, water, oil, mine, mill, factory, engineers', railroad, hardware and builders' supplies and material, and argricultural machinery and supplies, and the purchase and sale of such goods, wares, and merchandise used for such business, which said business it is permitted to do in the State of Illinois, being the state where it is incorporated, under the laws of said state, and which business it is now actually engaged in in said state.

3. The home office of said company is at Chicago, Illinois, and its business in Texas is to be transacted from the City of
73 Dallas. Name and address of agent in Texas, James E. Ludlow, and its principal place of business and principal office in the state of Texas is at Dallas.

4. The number of directors are nine (9), and the names and residences of its present directors are:

R. T. Crane, R. T. Crane, Jr., residence, Chicago;
C. R. Crane, A. F. Gartz, residence, Chicago;
A. D. MacGill, W. W. Doolittle, residence, Chicago;
J. T. Hayden, J. C. Kilgore, residence, Chicago;
A. F. Bennett, residence, Chicago.

5. The authorized capital stock of said company, subscribed o unsubscribed, is $10,000,000.00 divided into 100,000 shares a $100.00 each.

This application is accompanied by a copy of the original article of incorporation, together with all amendments thereto, of sai company, certified to under the han dand seal of Secretary of State the keeper of the records of articles of incorporation in the sai State of Illinois.

(Must be signed officially by President and Secretary of Board o Directors.)

CRANE COMPANY.
R. T. CRANE, *President,*
A. F. BENNETT, *Secretary.*

STATE OF ILLINOIS,
County of Cook:

Personally before me the undersigned authority on this da
74 appeared R. T. Crane and A. F. Bennett known to me t be the persons whose names are subscribed to the foregoin instrument, who each for himself acknowledged to me that he ex ecuted the same for the purpose and considerations therein ex pressed, and in the capacity therein stated. And the said A. F Bennett being further duly sworn on oath says, that the capita stock of said company subscribed is $10,000,000 and no more, an that one hundred thousand dollars has been paid in.

Witness my hand and official seal at Chicago, this sixth day o January, A. D. 1905.

[SEAL.] H. B. STILES,
Notary Public.

75 *Permit.*

No. 1592.

THE STATE OF TEXAS,
Department of State:

I, J. R. Curl, Secretary of State of the State of Texas, do hereby certify that a certified copy of Articles of Incorporation of Cran Company incorporated under the laws of the State of Illinois wit an authorized capital stock of $10,000,000 was filed in this de partment on the 16th day of January, 1905, in accordance wit requirements of the laws of the State of Texas; and I further certif that said corporation having paid the full amount of fees and taxe prescribed by the laws of this State, and having complied fully wit the law in all respects, is entitled to, and is hereby granted per mission to do business in the State of Texas, to the extent and fo the purposes as follows, to-wit: A manufacturing business, such a the manufacture of all kinds of steam, gas, water, oil, mine, mill factory, engineers', railroad, hardware and builders' supplies an material, and agricultural machinery and supplies and the purchas

and sale of such goods, wares and merchandise used for such business, for the term of ten (fiscal) years ending May 1st, 1914.

76 Witness my official signature and the seal of the State of Texas, affixed at the City of Austin, this the 16th day of January, A. D. 1905.

[SEAL.]

J. R. CURL,
Secretary of State.

77 Thereupon the defendants introduced in evidence Copy of petition filed in the District Court of Limestone County, Texas, as follows:

In the District Court of Limestone County, Texas, Thirteenth Judicial District Court, January Term, 1915.

No. —.

THE STATE OF TEXAS
v.
CRANE COMPANY.

To the Honorable Judge of Said Court:

The State of Texas, Plaintiff, represented herein by and through B. F. Looney, her Attorney General, and by J. E. Bradley, County Attorney of Limestone County, Texas, acting by the authority and under the direction of the Attorney General, complaining of Crane Company, represents to the Court:

1.

That Crane Company is a private corporation organized under and by virtue of the laws of the State of Illinois, with its home office in the City of Chicago, Cook County, Illinois; that said corporation is doing business in the State of Texas by virtue of a permit granted it by the State of Texas on the 16th day of January, 1905; that its office and principal place of business in Texas is in

78 Dallas, Dallas County, Texas; that James E. Ludlow, who resides in Dallas, Dallas County, Texas, is the agent of said corporation within the State of Texas and a person upon whom serive of process may be had.

2.

That the defendant from the date its permit was granted has been engaged in the business of selling within the State of Texas, steam, gas, water, oil, mine, factory, engineers', railroad, hardware and builders' supplies and materials; agricultural machinery and supplies; plumbing, mill and well supplies and materials and other goods, wares and merchandise, and that such supplies and materials and such other goods, wares and merchandise were and are articles and commodities of merchandise.

3.

That the said defendant since the date its permit was granted has continuously maintained and now maintains a large establishment in the City of Dallas, Dallas County, from which place it has furnished and supplied and now furnishes and supplies its customers throughout the State of Texas; that James E.
79 Ludlow has been and now is the General Manager of said Dallas house and has had and now has general authority and supervision of the business of said corporation transacted at and from said point.

4.

That The Ahrens & Ott Manufacturing Company, a private corporation, organized under and by virtue of the laws of the State of Kentucky, with its home office in the City of Louisville, State of Kentucky, is doing business in the State of Texas by virtue of a permit granted by the State of Texas on the 6th day of January, 1910; that its principal place of business in Texas is in Houston, Harris County; that said Company since on or about the date its permit was granted has continuously maintained and now maintains a large establishment in the City of Houston, Harris County; and since on or about July 15, 1911, has continuously maintained and now maintains a large establishment in the City of Fort Worth, Tarrant County, and since on or about January 1, 1913, has continuously maintained and now maintains a large establishment in the City of San Antonio, Bexar County, Texas, from which points it has furnished and supplied and continues to furnish and supply its customers throughout the State of Texas. That B. L. Logan since on and before January 1, 1912, has been and now is
80 the General Manager of the house situated in the City of Fort Worth and has had and now has general authority and supervision of the business of said corporation transacted at and from said point; that said Company since the date its permit was granted has been engaged in the business of selling within the State of Texas steam, gas, water, oil, mine, factory, engineers', railroad, hardware, builders' supplies and materials; agricultural machinery and supplies; plumbing, mill and well supplies and materials and other goods, wares and merchandise and that such supplies and material and such other goods, wares and merchandise were and are articles and commodities of merchandise.

5.

That heretofore, to-wit, on and prior to January 1, 1912, the defendant made and entered into a combination, agreement, consideration and understanding with the said The Ahrens & Mott Manufacturing Company, for the purpose of fixing and maintaining a uniform schedule of prices at which both said companies should sell their goods, wares and merchandise to the trade supplied within the State of Texas from their Dallas and Fort Worth houses, respectively. The defendant and the said The Ahrens & Mott Manufacturing Company, on and prior to said date, made and entered

into a combination, agreement, confederation and understanding with each other to sell their goods, wares and merchandise to the trade supplied within the State of Texas from their Dallas and Fort Worth houses, respectively, at the same prices; that it was agreed and understood by and between said companies that the selling prices of their goods, wares and merchandise at the points within the State of Texas supplied from their Dallas and Fort Worth houses, respectively, should from said date be at all times uniform and that no price cutting should be indulged in by either. It was understood and agreed upon by and between said companies that they should keep each other advised and posted as to any changes in the market prices of the goods, wares and merchandise sold by each of said companies; that if the defendant or The Ahrens & Ott Manufacturing Company should be advised from the factory or factories or from any other source of any change or changes in the market price or prices of any of the articles, goods, wares and merchandise sold by each of said companies, the said defendant or the said The Ahrens & Ott Manufacturing Company, under the terms of said agreement would immediately make a bulletin of said changes, which said bulletin would represent the selling prices within the State of Texas on all of the articles, goods, wares and materials listed and scheduled in said bulletin, and the said defendant or the said The Ahrens & Ott Manufacturing Company, would furnish said bulletin to the other company and immediately upon receipt thereof the said The Ahrens & Ott Manufacturing Company and the defendant would promulgate and put into effect the schedule of prices listed in said bulletin. By reason of and under the terms of said agreement, each company was obligated to respect, observe and maintain the same prices on all goods, wares and merchandise sold by said two companies to points within the State of Texas supplied and furnished from their Dallas and Fort Worth houses, respectively, and that by reason of and under the terms of said agreement whenever any changes were contemplated by either of said companies in the prices of any of their goods, wares and merchandise, same were not promulgated and put into effect until they were mutually agreed upon by both of said companies, at which time they were promulgated and put into effect simultaneously by both of said companies; that said combination, agreement, confederation and understanding so made and entered into by and between the defendant and the said The Ahrens & Ott Manufacturing Company, as above alleged, has been respected, observed and carried out within the State of Texas by the defendant and the said The Ahrens & Ott Manufacturing Company on each and every day from the date same was made and entered into, to-wit, on and prior to January 1, 1912, and until the date of the filing of this petition; that in pursuance of said combination, agreement, confederation and understanding, a uniform schedule of selling prices for the observance and use of the defendant and the said The Ahrens & Ott Manufacturing Company at points supplied and furnished by said companies within the State of Texas from their Dallas and Fort Worth houses, respectively, was immediately thereafter promulgated and put into

effect and the defendant and the said The Ahrens & Ott Manufacturing Company, and each of them have ever since said time, by reason of said combination, agreement and understanding, been selling their goods, wares and merchandise to the trade within the State of Texas supplied from their Dallas and Fort Worth houses, respectively, at the same prices; that whenever changes were made in the said bulletin or schedule of selling prices for Texas points were made as a result of an agreement or understanding between the defendant and the said The Ahrens & Ott Manufacturing Company and after having been thus made they were promulgated and put into effect and were observed and respected by the defendant and the said The Ahrens & Ott Manufacturing Company
84 within the State of Texas, and as a result of said agreements, combinations and understandings, the defendant and the said The Ahrens & Ott Manufacturing Company, and each of them, have sold to the trade within the State of Texas, supplied from their respective Dallas and Fort Worth houses, their goods, wares and merchandise at the same prices since on or prior to January 12, 1912, until the date of the filing of this petition.

6.

Plaintiff avers that by creating and entering into and becoming a member of and a party to such trust, agreement, combination, confederation and undertsanding, as alleged in paragraph 5, hereof, and by observing, respecting and maintaining said agreements, combinations and understandings to sell its goods, wares and merchandise at points within the State of Texas supplied from its Dallas house at prices agreed upon between it and the said The Ahrens & Ott Manufacturing Company, as above alleged, the defendant was and is guilty of violating the provisions of sub-divisions 1, 2, 3, 4 and 5 of Article 7796 Revised Civil Statutes of 1911 of the State of Texas, commonly known as the law *law* of the State of Texas against trusts, in that:

(*a*) That the acts of the defendant set out and complained of in said paragraph 5 hereof created and tended to create and
85 carry out restrictions within the State of Texas in the sale of steam, gas, water, oil, mine, factory, engineers', railroad, hardware and builders' supplies and material; agricultural machinery and supplies; plumbing, mill and well supplies and materials; and that said acts of the defendant set out and complained of in said paragraph 5 hereof created and tended to create, and carry out restraints in the free pursuit of the business of selling within the State of Texas, steam, gas, water, oil, mine, factory, engineers', railroad, hardware and builders' supplies and materials; agricultural machinery and supplies; plumbing, mill and well supplies and materials.

(*b*) That the acts of the defendant set out and complained of in paragraph 5 hereof had the effect and result of fixing and maintaining within the State of Texas the prices of steam, gas, water, oil, mine, factory, engineers', railroad, hardware and builders' sup-

plies and materials; agricultural machinery and supplies; plumbing, mill and well supplies and materials.

(*c*) That the acts of the defendant set out and complained of in paragraph 5 hereof had the effect and result of preventing and less-ing competition within the State of Texas in the sale of steam, gas, water, oil, mine, factory, engineers', railroad, hardware and builders' supplies and materials; agricultural machinery and
86 supplies, plumbing, mill and well supplies and materials.

(*d*) That the acts of the defendant set out and complained of in said paragraph 5 hereof had the effect and result of maintaining a standard and figure whereby the price within the State of Texas of steam, gas, water, oil, mine, factory, engineers', railroad, hardware and builders' supplies and materials; agricultural machinery and supplies; plumbing, mill and well supplies and materials, was affected, controlled, and established.

(*e*) That the acts of the defendant set out and complained of in said paragraph 5 hereof had the effect and result of preventing, affecting and lessening competition within the State of Texas, between the defendant and the said The Ahrens & Ott Manufacturing Company in the sale of steam, gas, water, oil, mine, factory, engineers', railroad, hardware and builders' supplies and materials; agricultural machinery and supplies; plumbing, mill and well supplies and materials.

7.

Plaintiff further avers that on and prior to January 1, 1912, the defendant made and entered into a combination, agreement, confederation and undertsanding with the said The Ahrens & Ott
87 Manufacturing Company, whereby it combined, agreed and had it understood with said company to refuse to sell within the State of Texas its plumbing goods, supplies and materials to any person except to those engaged in the plumbing business; that said combination, confederation, agreement and understanding has been observed, respected, maintained and carried out by the defendant from on and prior to January 1, 1912, until the date of the filing of this petition and that in pursuance of said combination, agreement, confederation and understanding the defendant has declined and refused and still declines and refuses to sell its plumbing goods, supplies and materials within the State of Texas to others than those engaged in the plumbing business, and as a result of the observance of said combination, agreement, confederation and understanding, a large number of persons within the State of Texas engaged in the hardware business, and a large number of merchants engaged in other lines of business within the State of Texas have been unable to purchase from the defendant plumbing goods, supplies and materials and only a favored few in each locality within the State of Texas have been *un*able to secure and obtain from the defendant its said line of goods.

88 8.

That by creating and entering into and becoming a member of and a party to such trust, agreement, combination, confederation

and understanding, as alleged and set out in paragraph 7 hereof and by observing, respecting, maintaining and carrying out said trust, agreement, combination, confederation and understanding to sell its plumbing goods, supplies and materials within the State of Texas only to those engaged in the plumbing business, the defendant was, has been and is guilty of violating the provisions of sub-division 1, Article 7798 of the Revised Civil Statutes of 1911 of the State of Texas, in that:

(2) That the defendant and the said The Ahrens & Ott Manufacturing Company were and are corporations engaged within the State of Texas in selling plumbing goods, supplies and materials and that the acts of the defendant and the said The Ahrens & Ott Manufacturing Company set out and complained of in said paragraph 7 hereof constitute an agreement and understanding between the defendant, a corporation, and the said The Ahrens & Ott Manufacturing Company, a corporation, to refuse to sell plumbing goods, supplies and materials to all persons within the State of Texas, except those engaged in a certain line of business,—the plumbing business.

89

9.

Plaintiff further avers that the defendant buys large quantities of pipe from the National Tube Company of Pittsburg, Pennsylvania, a private corporation, engaged in the business of manufacturing and selling pipe of all kinds and descriptions and that said National Tube Company has sold to the defendant since on and prior to January 1, 1912, from time to time continually until the filing of this petition large quantities of pipe of all kinds and descriptions, and that the defendant has in turn sold said pipe to the trade within the State of Texas from on and prior to January 1, 1912, until the date of the filing of this petition. Plaintiff avers that it has been and now is the practice, custom and policy of the said National Tube Company to furnish its customers in the State of Texas with re-sale prices on all pipe sold by it to them for resale within Texas, and that it requires its customers in the State of Texas in the re-sale of said pipe in the State of Texas, to observe, respect and carry out said re-sale prices so furnished, and in pursuance of said practice custom and policy the said National Tube Company since on and prior to January 1, 1912, until the date of the filing of this petition, as it has made sales of its pipe to the defendant herein for its Texas
90 trade, has furnished to the defendant re-sale prices on all such pipe so sold by it to the defendant and has required the defendant to observe, respect and carry out said re-sale prices in the sale by the defendant of said pipe to the trade within the State of Texas; that the defendant, when it purchased from the said National Tube Company said pipe, agreed with said company to observe and respect the re-sale prices furnished by it in the sale of said pipe to the trade within the State of Texas; that said agreement has been observed, respected and carried out within the State of Texas by the defendant since on and prior to January 1, 1912, until the date of the filing of this petition; that by reason of said agreement and combination with the National Tube Company the defendant has been

selling and is still selling to the trade within the State of Texas all the pipe bought of the National Tube Company for its Texas trade at the prices fixed and suggested by the said National Tube Company and that in accordance with said agreement and combination the defendant has at all times observed, and respected the re-sale prices furnished and suggested to it by the said National Tube Company on all pipe bought of said company for its Texas trade in the sale-
made by the defendant of said pipe within the State of Texas,
91 and that the prices at which the defendant has sold said pipe within the State of Texas have at all times been the prices suggested and furnished the defendant by said National Tube Company.

10.

That by creating, entering into and becoming a member of and a party to such trust, agreement, combination, confederation and understanding, as alleged and set out in paragraph 9 hereof and by observing, respecting and maintaining said agreements and combinations to sell pipe within the State of Texas at prices furnished and suggested by the said National Tube Company, the defendant was, and has been and is now guilty of violating the provisions of sub-division- 1, 2, 3 and 4 of Article 7796 of the Revised Civil Statutes of 1911 of the State of Texas, in that:

(*a*) That the acts of the defendant set out and complained of in paragraph 9 created and tended to create and carry out restrictions within the State of Texas in the sale of pipe, and the acts of the defendant set out and complained of in said paragraph 9 hereof created and tended to create and carry out restraints within the State of Texas in the free pursuit of the business of selling pipe;

(*b*) That the acts of the defendant set out and complained
92 of in said paragraph 9 hereof had the effect and result of fixing and maintaining within the State of Texas the price of pipe;

(*c*) That the acts of the defendant set out and complained of in said paragraph 9 hereof had the effect and result of preventing and lessening competition within the State of Texas in the sale of pipe;

(*d*) That the acts of the defendant set out and complained of in paragraph 9 hereof had the effect of and result of maintaining a standard and figure whereby the price of pipe within the State of Texas was affected, controlled and established.

11.

Plaintiff further avers that the defendant on and prior to January 1, 1912, made and entered into combination and agreements with certain other concerns engaged in the business of manufacturing and selling pulleys and other mill supplies, the names of which concerns are to plaintiff unknown, but same are known to the defendant, to the effect that the defendant would observe, respect and maintain re-sale prices furnished and suggested to it by said concerns in sales of pulleys and other mill supplies made by the defendant

and to the trade within the State of Texas and that said agree-
93 ments have been observed by the defendant within the State of Texas from on and prior to January 1, 1912, until the date of the filing of this petition; that by reason of said combinations and agreements, the defendant has from and prior to January 1, 1912, until the date of the filing of this petition, sold pulleys and other mill supplies to the trade within the State of Texas at prices fixed, suggested and dictated by the concerns from which it purchased said lines of goods.

12.

That by creating and entering into and becoming a member of and party to such trusts, agreements and combinations, confederations and understandings, as above alleged in paragraph 11 hereof and by observing, respecting and maintaining said combinations, agreements and confederations to sell to the trade within the State of Texas Pulleys and other mill supplies at prices furnished, supplied and dictated by the concerns from which the defendant bought said pulleys and other mill supplies, the defendant was, has been and is now guilty of violating the provisions of subdivision- 1, 2, 3, and 4 of Article 7796 of the Revised Civil Statutes of 1911, of the State of Texas, in that:

94 (*a*) That the acts of the defendant herein set out in paragraph 12 hereof created and tended to create and carry out restrictions within the State of Texas in the sale of pulleys and other mill supplies, and the acts of the defendant herein set out and complained of in paragraph 11 hereof created and tended to create and carry out restraints within the State of Texas in the free pursuit of the business of selling such pulleys and such mill supplies;

(*b*) That the acts of the defendant herein set out and complained of in paragraph 11 hereof had the effect and result of fixing and maintaining the price within the State of Texas of pulleys and other mill supplies;

(*c*) That the acts of the defendant herein set out and complained of in paragraph 11 hereof had the effect and result of preventing and lessening competition within the State of Texas in the sale of pulleys and other mill supplies;

(*d*) That the acts of the defendant herein set out and complained of in paragraph 11 hereof had the effect and result of maintaining a standard and figure whereby the prices of pulleys and other mill supplies within the State of Texas was affected, controlled and established;

95 13.

Plaintiff further avers that the defendant, in addition to making and entering into a combination, agreement, confederation and understanding with the said The Ahrens & Ott Manufacturing Company not to sell within the State of Texas plumbing supplies and materials to others than to persons engaged in the plumbing business on and prior to January 1, 1912, and on different dates since said time, has made and entered into combinations, agreements, and con-

federations with divers and sundry persons within the State of Texas engaged in the plumbing business in the different towns and cities within the State of Texas, whereby the said defendant has combined, agreed, and federated and had it understood by and between it and the persons so engaged in the plumbing business in the different towns and cities within the State of Texas that the said Crane Company would — sell its plumbing goods, supplies and materials in the different towns and cities within the State of Texas, to others than to those persons engaged in the plumbing business in said towns and cities; that said combinations, agreements and confederations have been observed, respected and carried out by the defendant from the time same were made until the filing of this petition and as a result thereof no persons within the State of Texas engaged
96 in any other line of business than that of the plumbing business have been enabled to purchase and obtain from the defendant plumbing goods, supplies and materials; that the names of the different persons, firms, corporations and associations of persons engaged in the plumbing business in the different towns and cities throughout the State of Texas with whom and with which the defendant made and entered into said combinations, agreements and confederations are to the plaintiff unknown, but are known to the defendant.

14.

That by creating and entering into and becoming a member of and a party to such trusts, agreements, combinations, confederations and understandings, as alleged and set out in paragraph 13 hereof, and by observing, respecting, maintaining and carrying out said trusts, agreements, combinations, confederations and understandings to sell its plumbing goods, supplies and materials within the State of Texas only to those engaged in the plumbing business, the defendant was, has been and is now guilty of violating the provisions of subdivision 1, Article 7798 of the Revised Civil Statutes of 1911 of the State of Texas, in that:

(*a*) That the defendant and the said persons, firms, cor-
97 porations and associations of persons engaged in the plumbing business within the State of Texas, were, have been and are now engaged in the business of buying and selling plumbing goods, supplies and materials within the State of Texas, and that the acts of the defendant and said persons, firms, corporations, and association- of persons set out and complained of in paragraph 13 hereof constitute an agreement and an understanding between the defendant and such persons, corporations, firms and associations of persons that the defendant would refuse to sell plumbing goods, supplies and materials to any person within the State of Texas except those engaged in a certain line of business, to-wit, the plumbing business.

15.

That the defendant, in consequence of the acts hereinabove complained of, has forfeited its right to do any further business within the State of Texas of an intrastate nature and has become liable to

the penalties provided by the provisions of Article 7806 of the Revised Civil Statutes of 1911 of the State of Texas and to a cancellation of its permit to do business within the State of Texas.

98 16.

That by reason of the unlawful acts hereinabove alleged, defendant has become liable to pay to the State of Texas the sum of Fifteen Hundred Dollars per day for each and every day from January 1, 1912, until the date of the filing of this petition; that under and by virtue of the laws of the State of Texas plaintiff herein has a lien upon all the properties belonging to the defendant of every kind and description situated within the State of Texas to secure the penalties for which said corporation may be liable.

17.

Wherefore, *premesis* considered, plaintiff prays that the defendant be cited to appear and answer herein; that on final hearing hereof it have judgment cancelling its permit to do an intrastate business within the State of Texas, foreclosing the lien hereinabove set out and enjoining the defendant from further transacting intrastate business within the State of Texas and from further respecting and carrying out the illegal combinations and agreements hereinabove set out, and from hereafter forming or entering into any other combination or making any other agreements or agreements, contract or contracts, in violation of the Anti-trust Statutes of the State of Texas, for penalties in the sum of Fifteen Hundred Dollars per day for each and every day from January 1, 1912, to the date of
99 the filing of this petition, for costs of suit and for all other relief to which plaintiff may be entitled in law or equity.

The defendants introduced in evidence copy of the answer filed by Crane Company to the petition filed by the State of Texas against it in the District Court of Limestone County, Texas, as follows:

100 In the District Court of Limestone County, Texas, Thirteenth Judicial District Court, January Term, A. D. 1915.

STATE OF TEXAS
v.
CRANE COMPANY.

Now at this time comes the Crane Company, defendant in the above entitled cause, who appears herein only for the purpose of pleading to the jurisdiction of this court, and no- otherwise, and respectfully represents and shows to the court that this court has no jurisdiction to hear and determine the matters and things alleged against it in plaintiff's petition on file herein; for that it avers that it is a foreign corporation, duly organized and existing as such, under and by virtue of the laws of the state of Illinois, with a permit granted it by the State of Texas, in pursuance of law, to do business

in said state, and that its principal office for the transaction of its business in said state, under its permit is in and at the city of Dallas in Dallas county, Texas. That, as appears by the petition on file herein, this suit among other things is to cancel defendant's
101 permit to do business and to prohibit it from doing any intrastate business within the state of Texas; and that, as of record as is manifest, among other things an injunction is sought by the State to prevent and restrain it from doing any intrastate business within the State of Texas; and that the said suit has for its dominant purpose and object the cancellation of the said permit and the enjoining of it from doing an intrastate business within this state. And that by the terms of Art. 8703 of the Revised Statutes the venue of this suit and the jurisdiction herein to determine the suit to cancel and annul said permit and for injunction is vested and fixed in the District Court of Travis county, Texas, and not in the District Court of Limestone county, Texas, and that this court is without jurisdiction or power to hear and determine this suit in so far as the same seeks the cancellation of the permit of this defendant to do business in this state, and in so far as same seeks an injunction against this defendant restraining and enjoining it from doing business in this state.

Defendant further avers that the fact that the state joins herein, with its action for cancellation and an injunction, a suit for penalties does not have the effect to give this court jurisdiction
102 to hear and determine the State's suit for cancellation of its permit and for injunction to restrain it from doing business in this state, all of which it is ready to verify.

Defendant further avers that this court has no jurisdiction to hear and determine this suit for and on account of, or in respect to any of the matters contained and averred in plaintiff's said petition including its action for penalties, for that it avers that, on heretofore to-wit: the 27th day of June, 1914, the State instituted its suit in the District Court of Travis County, Texas, a county duly organized and existing as such within the State of Texas, against this defendant and the Ahrens & Ott Manufacturing Company, another foreign private corporation doing business in this state, said suit being No. 31147 on the docket of the District Court of Travis county, Texas, in which the state made substantially the same allegations and brought suit for the same matters and things as are demanded in this suit, including a forfeiture and cancellation of its permit to do business, and for penalties in substantially the same sum and amount as are sought to be recovered in this suit from January 1st, 1912, to the date of the filing of said suit in the District Court of Travis County, Texas; and that the acts, doings and alleged violations of the law charged against it in said suit filed in the
103 District Court of Travis county, Texas, are substantially the same as those alleged against it in this suit, all of which will fully appear by reference to a copy of the original petition filed against it in said District Court of Travis county, Texas, which is hereto attached marked "Exhibit A", and made a part hereof; and that by reason of the fact that the state elected to institute and did

institute its said suit for penalties against this defendant in the District Court of Travis county, Texas, that this act and fact gave the said District Court of Travis County, Texas, jurisdiction to hear and determine said matter, and constituted an election by the Attorney General to bring said suit in Travis County, Texas, and operated to fix the venue of said suit for penalties in said Travis County, and that it is not within the power of the Attorney General or permitted or permissible in law for the Attorney General thereafter to voluntarily dismiss said suit in Travis County, Texas, and reinstate same in Limestone County, Texas, or in any other county in this state. Defendant further avers that thereafter on the 17th day of July, 1914, the said suit so instituted in the District Court of Travis county, Texas, was by the state voluntarily dismissed from the docket of said court without its knowledge and without its consent. Defendant further avers that soon after the institution
104 o fthe said suit in the District Court of Travis county, Texas, in which heavy penalties therein set forth were sought to be recovered against it with the other relief therein sought, that at great expense it employed local counsel residing in Austin, Travis county, Texas, and made arrangements with its regular counsel residing in Dallas county, Texas, as well as the local counsel employed by it in Austin, Travis county, Texas, to defend such suit; and that if this suit now brought against it in Limestone county is permitted to be continued and prosecuted in this forum it will be necessary to employ additional counsel in Limestone county, Texas, at additional expense, for the protection of its interests and the proper defense of this suit; and that the effect of the prosecution of this suit in Limestone county considered in connection with the institution and dismissal of the suit in Travis county, Texas, would impose a heavy financial burden upon defendant and subject it to great inconvenience and loss, in violation of the provisions of the statutes and especially Art. 7806 Vernon's Sayles Statutes, and it now here comes and pleads to the jurisdiction of this court to hear and determine any or all matters alleged in plaintiff's petition on file herein, and comes and pleads to the venue of this court and says the
105 court has no jurisdiction of its person herein and that the venue of this suit which is attempted to be laid in Limestone county, Texas, is improperly laid and that the true and proper venue of all matters averred against it in the petition on file in the District Court of Travis county, Texas, and defendant asks and prays the court to hear proof, if needed, on the allegations herein made, to hold and declare that this court has no jurisdiction to hear and determine the matters in respect to which the state contends against it, and that its said plea of venue and to the jurisdiction of this court be sustained, and that this court hold that it has no jurisdiction to hear and determine the matters alleged against it in this suit, and that the venue of said suit is improperly laid, and that under the law the venue of said suit is fixed, in view of the acts and conduct of the state as above averred, in Travis county, Texas, and that this suit be transferred as the law provides to Travis county, Texas, for further proceedings in accordance with the law. Defendant further

avers that no exception mentioned in Art. 1830, Revised Statutes, 1911, or in any law of this state, exists, justifying the bringing of this suit in Limestone county, Texas, or in any county other than in Travis county, Texas, all of which it stands ready to verify.

CRANE COMPANY,
Per JAS. E. LUDLOW.

106 STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, on this day personally appeared James E. Ludlow, who being by me duly sworn deposes and says that he is an agent of the Crane Company, defendant in the above entitled suit, and that the matters and things alleged and averred in the above and foregoing plea to the jurisdiction are true.

(Signed) JAS. E. LUDLOW.

Sworn to and subscribed before me, this the 17th day of August, A. D. 1914.

[L. S.] CHAS. T. McCORMICK,
Notary Public in and for Dallas County, Texas.

Subject to its plea to the jurisdiction and venue and not waiving same, but in all respects subject thereto, the defendant comes and excepts to plaintiff's petition on file herein and says the same is insufficient in law and of this it prays the judgment of the court.

(1) It especially excepts to said petition, for that it appears therefrom affirmatively that this court has no jurisdiction to hear and determine this suit in so far as same seeks a cancellation and for-
107 feiture of its franchise and permit to do business and injunction restraining it from doing business in the State of Texas, for that the law fixes venue of such suit in Travis county, Texas, and no facts are alleged in said petition which would authorize this court to take jurisdiction of said suit in so far as same seeks such cancellation and injunction.

(2) Defendant further specially excepts to subdivisions 11 and 12 of plaintiff's petition, for that same are vague and indefinite and do not name or specify the person or persons, firms or corporations with whom it is contended defendant entered into any agreement with reference to the selling of pulleys and mill supplies, and said allegations are so vague and indefinite as not to enable this defendant to be advised of the nature of the charge and conspiracy laid against it.

(3) Defendant especially excepts to paragraph 13 of plaintiff's petition where it is alleged in substance that this defendant has made and entered into combination with divers and sundry persons engaged in the plumbing business in different towns and cities within the state of Texas whereby this defendant has combined, agreed, confederated and had understood between it and the said persons so engaged in the plumbing business in different towns and cities in the state that the said Crane Company would not sell
108 its plumbing goods, supplies and materials in the different towns and cities within the state of Texas to others than

those persons engaged in the plumbing business in said cities and towns, and that such combinations, agreements and confederations have been observed by defendant, and that as a result thereof no persons within the state of Texas engaged in any other line of business from that of plumbing have been able to purchase and obtain from this defendant plumbing goods, supplies and materials, and that the names of such persons with whom defendant is alleged to have combined are unknown to the state but are known to the defendant. These allegations are so vague and indefinite as to be held insufficient to authorize the state to maintain suit for and on account of the matters therein alleged; said paragraph is insufficient in that it does not name any person or persons or the residence of any person or persons with whom defendant is charged to have combined and conferedated, is a mere fishing allegation and wholly insufficient to form the basis of any belief.

(4) Defendant further specially excepts to the 16th paragraph of the plaintiff's petition herein, wherein it is alleged that the
109 defendant has become liable to pay to the State of Texas the sum of Fifteen Hundred ($1500.00) Dollars per day for each and every day from January 1st, 1912, till the date of the filing of this petition because this defendant says that the pretended law declared on in the plaintiff's petition as a basis for its right to recover penalties herein is invalid and void because it contravenes section 1 of the Fourteenth (14) Amendment of the Constitution of the United States of America which protects this defendant against the denial by any state to any person within its jurisdiction the equal protection of the laws, which equal protection of the laws is denied to this defendant by the state of Texas in said statute and by the Section thereof reading as follows:

"The provisions of this law shall not apply to agricultural products or live stock while in the hands of the producer or raiser; and it shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor and personal service, in their respective pursuits and employments."

(5) This defendant further *further* specially excepts to the 16th paragraph of said petition, wherein the plaintiff declared that the defendant became liable to pay to the state of Texas the sum of One Thousand Five Hundred ($1,500.00) Dollars per day from January 1, 1912, because this defendant says that the pretended law of the state of Texas which the plaintiff claims was in force on
110 January 1, 1912, and continuously thereafter down to this time, does not authorize or permit the recovery of One Thousand Five Hundred ($1,500.00) Dollars per day for the violation thereof.

(6) Defendant specially excepts to the ninth (9th) and tenth (10) paragraphs of said petition because it clearly appears from the allegations thereof that the alleged transactions and contracts complained of between the defendant and the National Tube Company

of Pittsburgh, Pennsylvania, are of and concerning interstate commerce, and the stipulations and agreements thereof are considerations entering into and becoming a part of the purchase price of goods, wares and merchandise sold and delivered in interstate commerce, the regulation of which is taken away from the state of Texas by the third (3r-) clause of section 8 of the constitution of the United States of America, which provides that the Congress of the United States shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes; which power has been exercised by Congress and in the plane of legislation against trusts and conspiracies against trade and
111 by this congressional legislation only may the validity of the transactions set forth in said paragraphs ninth (9th) and tenth (10th) be tested, of all of which defendants prays judgment.

W. F. RAMSEY AND
ETHERIDGE, McCORMICK &
BROMBERG,
Attorneys for Defendant.

And further answering herein expressly subject to its plea to the jurisdiction and not in any sense waiving same, the said defendant comes and files this its answer to the plaintiff's said petition expressly denying each and every allegation therein contained, except such as are herein expressly admitted and for answer avers and charges:

1.

Defendant admits the allegations and facts stated in paragraph 1 of plaintiff's petition.

2.

Defendants admits the allegations and the facts stated in paragraph 2 of plaintiff's petition.

3.

Defendant admits the facts stated in paragraph 3 of plaintiff's petition, except the following portions thereof "that James
112 E. Ludlow has been and is now the General Manager of said Dallas House, and has had and now has general authority and supervision of the business of said corporation transacted at in every said point"; in respect to this matter defendant further says that the facts are that the said James E. Ludlow is the manager of its Dallas house and the business transacted therefrom in Texas subject to the direction and authority of the directors and managing officers of the parent house of the Crane Company at Chicago, Illinois, with authority to conduct and transact all business of said company in Texas in all respects in accordance with law and with no authority to do or perform any act for or on account of said defendant in violation of any of the laws civil or criminal of this state.

4.

That as defendant is informed and believes the facts stated in paragraph 4 of plaintiff's petition are substantially correct. That it has not information or knowledge sufficient to deny the matters and things contained in paragraph 4, but so far as its information extends the facts set forth in said paragraph are in substance at least true.

113

5.

Defendant says that all and singular the allegations contained in paragraph 5 of plaintiff's said petition and each and every charge of violation therein made is untrue and defendant distinctly denies all and singular the allegations and facts therein stated and in respect to said paragraph 5 says that the matters and things therein alleged are in fact and in substance untrue.

6.

Defendant says that the allegations contained in paragraph 6 of plaintiff's petition including subdivisions *a*, *b*, *c*, *d*, and *e* are untrue, and each and every allegation contained are herein and hereby expressly denied and defendant comes and says that all the allegations and facts set forth and contained in paragraph six of the plaintiff's said petition are untrue in substance and effect

7.

Defendant says it is untrue that at any time it made and entered into any combination, agreement, confederation or under-
114 standing with the Ahrens & Ott Manufacturing Company whereby it combined, agreed, and had it understood with said company to refuse to sell within the State of Texas plumbing goods to any person except to those engaged in the plumbing business. That it is true and has been true for many years that defendant does refuse to sell its plumbing goods to any person, form or corporation not *ne*gaged in the plumbing trade, but that this practice on the part of the defendant is not the result of a conspiracy or understanding with another person but is a business policy authorized as it believe- by law, and a reasonable and just policy: and that during all the time complained of by the state and for many years prior thereto and now it does sell to all plumbers in the State of Texas without discrimination or exception on fair and equal terms for cash and for credit with such firms, persons or corporations as in its judgment are entitled to credit, and that it makes no discrimination as to persons engaged in the plumbing business, and has never done so.

8.

Defendant denies that by its acts or by any acts done or per-

formed by it or its practice of selling plumbing goods to
115 plumbers only, that it is or has been guilty of violating the provisions of sub-division 1, Art. 7798 of the Revised Civil Stat-es of 1911, or of any other law of said state. Defendant denies the allegations and statements contained in paragraph *a* subdivision 8 of plaintiff's petition in the manner and form as therein averred. That it is true that there are corporations engaged in the state of Texas in selling plumbing goods, supplies and materials, but it denies any of its acts constitute an agreement, or that it has ever made any agreement, or has had any understanding with the Ahrens & Ott Manufacturing Company to refuse to sell plumbing goods, supplies and materials to all persons within the state of Texas, except those engaged in the plumbing business. But it is true, as stated above, that it has always refused and declined to sell plumbing goods to any person in said state not engaged in the plumbing business.

9.

Defendant denies the matters and things set up and contained in paragraph 9 of plaintiff's petition and especially denies that it buys large quantities or any quantities of pipe from the National Tube Company, of Pittsburgh, Pennsylvania, or that said company
116 has sold it at any time since or prior to January 1st, 1912, any quantities large or small of pipe or any or all descriptions. But says that any and all pipe received by it from the said National Tube Company has been on consignment only and has not been pipe bought by this defendant from said Tube Company, and that in selling the pipe upon consignment from said National Tube Company it is acting only as a distributing agency for said company and sold the pipe only on a commission and it denies any agreement or combination with said National Tube Company in violation of law, and says that its acts and conduct in selling said pipe is wholly authorized by law, and that all and singular the allegations in plaintiff's petition contained in paragraph 9 of same alleging the purchase by it of pipe from the National Tube Company and its resale as said paragraph contains are untrue, and with respect to all matters it has kept strictly within the law and has not been guilty of any violation of any law of this state.

10.

Defendant especially denies all and singular the allegations contained in paragraph 10th of plaintiff's petition and in all the subdivisions *a*, *b*, *c*, and *d*, thereof.

117 11.

Defendant denies all and singular the allegations contained in sub-division 11 of plaintiff's petition.

12.

Defendant denies all and singular the allegations contained in sub-division 12 of plaintiff's petition and in paragraphs *a*, *b*, *c*, *d*, and *e* of same.

13.

Defendant denies all and singular the allegations contained and facts stated in sub-division 13 of plaintiff's petition.

14.

Defendant denies all and singular the allegations contained in subdivision 14 of plaintiff's petition, including subdivision *a* of same.

15.

Defendant denies all and singular the allegations contained and the facts stated in sub-division 15 of plaintiff's petition.

16.

Defendant denies all and singular the allegations and facts stated in sub-division 16 of plaintiff's petition.

118 17.

Wherefore defendant says that plaintiff is not entitled to recover against defendant in this behalf and prays, in the event its plea to the jurisdiction be overruled and this court take jurisdiction of this suit, that all and singular the relief prayed for by plaintiff be denied, and that the state take nothing by said suit and that it go hence without day and recover its costs and for such other and further relief general and special, legal and equitable as its cause merited and as in duty bound it will ever pray.

W. F. RAMSEY AND
ETHERIDGE, McCORMICK
& BROMBERG,
Attorneys for Defendant.

The foregoing constitutes the testimony and statement of all the evidence introduced and offered upon the hearing of this cause.

ETHERIDGE, McCORMICK
& BROMBERG,
Attorneys and Solicitors for
Crane Company, Plaintiff.
BEN F. LOONEY,
Attorney General of Texas,
C. A. SWEETON,
C. M. CURETON,
Assistants Attorney General,
Attorneys for the Defendants.

119 On this the 12th day of January A. D. 1915, the foregoing bill of exceptions having been presented to me the same is hereby in all things allowed and approved, and the same is ordered filed as the bill of exceptions in the above styled and numbered cause.

EDWARD R. MEEK,
United States District Judge.

120 *Opinion of the Court.*

Filed December 15th, 1914.

In the District Court of the United States for the Northern District of Texas, at Dallas.

CRANE COMPANY
v.
BEN F. LOONEY, Attorney General, et al.

Application for Temporary Injunction.

Etheridge, McCormick & Bromberg, for the Complainant.
B. F. Looney, Attorney General.
C. A. Sweeton and G. M. Cureton, Assistant Attorneys, for defendants.

Before Walker, Circuit Judge, and Meek and Call, District Judges.

Memorandum Opinion.

MEEK, *District Judge:*

This case is brought by Crane Company, an Illinois corporation, against Ben F. Looney, as Attorney General of the State of Texas, and against F. C. Weinert, as Secretary of State of the State of Texas, for the purpose of restraining the defendants in their official capacities from enforcing against plaintiff the provisions of Articles 3837 and 7394 of the Revised Statutes of Texas (1911).

It appears from plaintiff's bill and from the evidence that under its charter it is engaged in the business of manufacturing, buying, selling and otherwise dealing in various lines of hardware, builders' supplies and material, and agricultural machinery and supplies; that more than twenty years ago plaintiff entered the state of Texas with its goods, wares and merchandise, selling them through traveling salesmen who took orders and sent them to the plaintiff's principal office and place of business at Chicago, Illinois, for acceptance and filling through shipment; that it received, accepted and filled orders sent it through the mails from merchants living in Texas; that for many years it has been engaged in interstate com-
121 merce between Texas and the other state- of the union; that for the purpose of facilitating the transaction of its business

and in order that it might the more conveniently serve those with whom it transacted such commerce it established agencies throughout the country, an agency having been established in Dallas, Texas, in 1904.

It also appears that during the year 1905 the plaintiff applied for and secured from the State of Texas a permit to do business within the state for the succeeding ten years; that during the time intervening between the year 1906 and the time of the filing of this bill, it has conducted an extensive interstate and intrastate business and has made permanent investments in the city of Dallas, Texas, in the way of a lot, building and equipment for the more efficient and economical conduct of such business.

It is shown that plaintiff's present permit to do an intrastate business in Texas expires on the 15th day of January 1915, and plaintiff avers that it will not apply to the Secretary of State for a renewal of this permit, nor meet the conditions in the way of the payment of fees necessary to secure such permit; that it will not at the expiration of the present franchise tax on May 1, 1915, pay a franchise tax in compliance with the laws of the state for the fiscal year ending May 1, 1916. Plaintiff further avers that the defendants, the Attorney General and the Secretary of State, will undertake to enforce the laws of the state of Texas against it, and it will thereby be harrassed, annoyed and impeded in transacting its business in interstate commerce and the business inseparably connected therewith and will also be ousted from doing an intrastate business in said state.

The plaintiff assails the validity of Articles 3837 and 7394 of the Revised Statutes of Texas (1911), and alleges that their provisions are in violation of the rights of plaintiff guaranteed to it under the Constitution of the United States, Article I, Section 8, paragraph 4, which, among other things, grants the Congress
122 the power to regulate commerce among the several states, and under the first section of the Fourteenth Amendment to the Constitution of the United States, which guarantees plaintiff against being deprived by any state of its property without due process of law and against being deprived of the equal protection of the law. The part of Article 3837 applicable to the plaintiff and here complained of is as follows:

"*For* each foreign corporation obtaining permit to do business in this state shall pay fees as follows: fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this state shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, so called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each additional one hundred

thousand dollars, or a fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the state of Texas. (Acts 1907, S. S., p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p. 87. Acts 1883, p. 72. Acts 1909, S. S., p. 267)."

Article 7394 is as follows:

"Art. 7394. Tax to be paid by foreign corporations.—Except as herein provided, each and every foreign corporation, authorized, or that may hereafter be authorized to do business in this state, shall on or before the first day of May of each year pay in advance to the secretary of state a franchise tax for the year following, which shall be computed as follows, viz: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars or fractional part thereof, of the authorized capital stock of such corporation, issued and out-
123 standing, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten million dollars; provided that such franchise tax shall not in any case be less than twenty-five dollars. Act 1907, p. 503, Sec. 2)."

It is revealed that the business of plaintiff under its charter is not itself commerce. It is engaged in the manufacture and sale of certain goods and in the purchase and sale of the goods of other manufacturers. The greater part of these goods are disposed of in interstate commerce, and a small portion in intrastate commerce in Texas. A decided preponderating percentage of the plaintiff's property is located outside the state of Texas. The same preponderating percentage of its business is done outside the state.

By the terms of the above statutes the state sought to fix upon certain classes of foreign corporations an excise tax for the privilege of exercising their franchises within the state of Texas; that a franchise tax of this character is within the power of the state to

levy, there can be no question. Maine v. Grand Trunk Railway Co., 142 U. S. 228.

The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact from the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. Home Insurance Company v. New York State, 134 U. S. 594. However, a state cannot say to a corporation: "You may do business within our borders if you permit your property to be taken without due process of law, or, you may transact business in interstate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would
124 permit it to deprive of fundemental rights those entitled to the protection of the constitution in every part of the union; but a tax levied by the state upon the right of a corporation to do business in the state (that is, a franchise tax), will not be invalidated unless its necessary effect is to burden interstate commerce." Baltic Mining Company v. Massachusetts, 231 U. S. 68.

Does compliance by the plaintiff with the statutes here complained of impose a burden upon interstate commerce, or violate the provisions of the first section of the Fourteenth Amendment to the Constitution? The necessary effect of the enforcement of the two statutes brought into question is to make the plaintiff's right to do a Texas intrastate business dependent upon the payment of a sum which becomes greater or less according as its assets outside of the state and its interstate and foreign business grow greater or smaller, though its property situated in Texas and its intrastate business there may remain stationary. The case of the Baltic Mining Company, cited supra, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the state or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business any where or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more or less than the amount of the par value of its authorized capital stock and whatever may have been the nature or extent of the business in which it was engaged. Nothing said in the opinion rendered in that case indicates the court's departure from or
125 modification of the rule announced in Western Union Telegraph Company v. Kansas, 216 U. S., pp. 1 and 42, to the effect that a state may not forbid the doing of a local business within its limits by a corporation of another state or foreign country except subject to the condition that such corporation first pay to the state a given per cent of its entire capitalization, representing the

value of all its business, property and interests within and without the state, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the state for purposes of taxation. The joint effect of the two statutes, considered together, as they must be, as the right of the corporation to do business in the state is withheld if either of them is not complied with, is to make the privilege of doing a local business in Texas subject to the condition that it shall first pay to the state a given per cent of all its capital and surplus, representing all of its property wherever situated, and all its business, interstate and intrastate. An imposition which is based, whether in whole or in substantial part, on the value of the property outside of the state, or on interstate or foreign commerce engaged in, so that the amount of its grows in exact proportion to the growth of such property or commerce is a burden on such property or commerce. This burden the state cannot impose either directly or as a condition to the grant of a privilege which it may confer or withhold. The statutes in question so obviously impose such a burden that it is not permissible to regard them as privilege taxes or excises the amount of which is determined by something not having a necessary relation to the amount of value of things which are not subject to the state's taxing power. The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to state taxation, and being greater or less according as such
126 property or business is greater or less, the necessary effect of the enforcement of them is to burden such property or business. The court is therefore constrained to grant the preliminary injunction prayed for, and an order will be entered accordingly.

127 *Order Granting Interlocutory Injunction.*

Filed and Entered December 21st, 1914.

In the District Court of the United States for the Northern District of Texas, at Dallas. In Equity.

No. 2782.

CRANE COMPANY
vs.
BEN F. LOONEY et al.

On the filing of plaintiff's original bill praying for an interlocutory injunction restraining the Attorney General of Texas and the Secretary of State of Texas from enforcing against the plaintiff the statutes of the State of Texas requiring every foreign corporation of the class of plaintiff, which is engaged in doing business in the State of Texas, to pay a permit fee and a franchise tax, the District Judge, Honorable Edward R. Meek, to whom said bill was pre-

sented as an application for an injunction, called to his assistance Honorable Richard W. Walker, United States Circuit Judge for the Fifth Circuit, and Honorable Rhydon N. Call, United States District Judge for the Northern District of Florida, and after more than five days' notice of the hearing had been given to each of the defendants, one of whom is the Attorney General of the State of Texas, and to the Honorable Oscar Branch Colquitt, Governor of the State of Texas, the said application came on for hearing at Fort Worth, Texas, before the said Judges on the 13th day of November 1914. The Judges having heard the testimony and argument of counsel, find on the facts put in issue by the pleadings, as follows:

That the plaintiff, Crane Company, under its charter, is engaged in the business of manufacturing, buying, selling and otherwise dealing in various lines of hardware, builders' supplies and material, and agricultural machinery and supplies; that more than
128 twenty years ago plaintiff, Crane Company, entered the State of Texas with its goods, wares and merchandise, selling them through traveling salesmen who took orders and sent them to the plaintiff's principal office and place of business at Chicago, Illinois, for acceptance and filling through shipment; that plaintiff, Crane Company, received accepted, and filled orders sent it through the mails for merchants living in Texas; that for many years plaintiff, Crane Company, has been engaged in interstate commerce between Texas and the other states of the Union; that for the purpose of facilitating the transaction of its business and in order that it might the more conveniently serve those with whom it transacted said interstate commerce, Crane Company established agencies throughout the country, one of which was an agency established at Dallas, Texas, in 1904.

That during the year 1905 plaintiff, Crane Company, applied for and secured from the Secretary of State of the State of Texas a permit to do business within the state for the succeeding ten years; that during the time intervening between the year 1906 and the time of the filing of plaintiff's bill it has conducted an extensive interstate and intrastate business and has made permanent investments in the city of Dallas, Texas, in the way of a lot, building and equipment for the more efficient and economical conduct of such business; that plaintiff's permit to do an intrastate business in the State of Texas expires on the 15th day of January 1915, and that the period covered by plaintiff's present franchise tax expires on May 1, 1915, and that plaintiff, Crane Company, will not apply for a permit on or after January 15, 1915, nor pay a franchise tax on or after May 1, 1915; that the defendants, the Attorney General and the Secretary of State will undertake to enforce the permit and franchise tax laws against Crane Company unless enjoined, and that the enforcement of the provisions of such laws by the defendants in their official capacities will annoy, harass, and impede plaintiff in its business in interstate commerce and its intrastate business inseparably connected therewith and oust Crane Company from doing an intrastate business in Texas; that the collection from
129 plaintiff by the Secretary of State of taxes under the provisions of Articles 3837 and 7394 of the Revised Statutes of

Texas, 1911, as a necessary effect, will impose a burden on the interstate commerce business of the plaintiff and, as a necessary effect will exact of the plaintiff a tax upon property not subject to taxation by the State of Texas.

The Judges therefore conclude that as matter of law the interlocutory injunction should issue as prayed for.

It is therefore ordered that the defendant Ben F. Looney, as Attorney General of the State of Texas, be and he is hereby enjoined, until further order of this court, from attempting in any wise to enforce against the plaintiff, Crane Company, the permit and franchise tax laws of the State of Texas relating to foreign corporations and from instituting any suit for the collection of any franchise taxes or penalties, or any suit to cancel the permit of the plaintiff to do business in Texas on the ground that it has failed to pay the fees required by the statutes of the State of Texas from foreign corporations doing business therein, and from instituting any suit against the plaintiff to enjoin it from transacting business in the State of Texas founded on the failure of the plaintiff to pay said permit fees or franchise taxes.

And it is therefore further ordered that the defendant F. C. Weinert, as Secretary of State of the State of Texas, be and he is hereby enjoined until further order of this court from undertaking in any manner to enforce against plaintiff, or any of its officers, agents, or stockholders, the permit or franchise tax statutes of the State of Texas relating to foreign corporations, and from making any entry in the books of his office signifying that the permit of the plaintiff to do business in Texas has been forfeited, and from issuing any certificate to any person whomsoever to the effect that the permit of the plaintiff to do business in Texas has been forfeited, and from issuing at any time, and especially on and after January 15, 1915, any certificate evidencing the fact that Crane Company's permit has expired, or evidencing the fact that Crane Company has failed or refused to obtain an additional permit beginning January 15,
130 1915, and from preparing, circulating, or furnishing to any one whomsoever on or after May 1, 1915, any certificate showing that Crane Company has failed or refused to pay a franchise tax, or to obtain any further or other franchise tax receipt, and from preparing, circulating, or furnishing to any person whomsoever a certified copy either of plaintiff's permit to do business in Texas, or of its franchise tax license or receipt for the franchise tax paid by Crane Company on May 1, 1914.

To the action of the court and Judges in making said findings of fact and conclusions of law, and each of them, and in granting said interlocutory injunctions, and each of them, the defendants Ben F. Looney, as Attorney General, and F. C. Weinert, as Secretary of State, each excepted in open court at the time the same were announced and each gave notice of an appeal from this order to the Supreme Court of the United States.

Dated December 21st A. D. 1914.

EDWARD R. MEEK,
U. S. District Judge.

131 *Notice of Resignation of Office and Suggestion of Abatement of Suit as to the Defendant F. C. Weinert.*

Filed January 11th, 1915.

In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2782. In Equity.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

Now at this time comes F. C. Weinert, one of the defendants in this cause, and with respect suggests to the court that this action as to him has abated, by reason of the fact that on the 21st day of November A. D. 1914, he resigned his office as Secretary of State of the State of Texas and has not since occupied the same nor exercised any authority with reference thereto, nor will he do so.

That the Hon. D. A. Gregg, of Leon county, Texas, was on the said date appointed Secretary of State to fill out the unexpired portion of the term of the said F. C. Weinert and he is now the duly qualified and acting Secretary of State, having taken the constitutional oath and filed the necessary bond required by law.

In support of the foregoing statements there is herewith tendered the court a certificate by the Hon. O. B. Colquitt, Governor of the State of Texas, and one by the Hon. D. A. Gregg, Secretary of State of the State of Texas, showing the facts as suggested above.

Wherefore, the said F. C. Weinert suggests to the court that this suit is abated as to him and prays the court to enter an order to that effect; provided, however, that should the court decline said prayer, then he reserves the right to file his petition for appeal and to file his assignments of error and perfect his appeal in this case as is allowed and permitted a defendant under the law.

B. F. LOONEY,
Attorney General,
C. A. SWEETON,
C. M. CURETON,
132 *Assistants Attorney General,*
Attorneys for the Defendant F. C. Weinert, Formerly Secretary of State of the State of Texas.

The defendant F. C. Weinert asks leave of the court to file the above notice.

B. F. LOONEY,
Attorney General,
C. A. SWEETON,
C. M. CURETON,
Assistants Attorney General,
Attorneys for F. C. Weinert, Defendant.

133 *Certificate of the Governor of Texas Accompanying Notice and Suggestion of Abatement.*

Filed January 11th, 1915.

THE STATE OF TEXAS,
Department of State:

Know ye that I, O. B. Colquitt, Governor of the State of Texas, do hereby certifiy that on the 1st day of June A. D. 1913, by virtue of the authority vested in me as Governor of the State of Texas, I appointed Hon. F. C. Weinert Secretary of State of the State of Texas to succeed the Honorable John L. Wortham, resigned; that on the 21st day of November A. D. 1914, Hon. F. C. Weinert resigned as Secretary of State of the State of Texas. That by virtue of the authority vested in me by the constitution and laws of this State, I appointed D. A. Gregg, of Leon County, Texas, Secretary of State to fill the unexpired portion of this term; that he is now the duly qualified and acting Secretary of State, having taken the constitutional oath of office and filed the necessary bond required by law.

In testimony whereof, I have hereunto subscribed my name officially and caused to be impressed hereon the Great Seal of State at my office in the City of Austin, Texas, this seventh day of January A. D. 1915.

[SEAL.]

O. B. COLQUITT,
Governor of Texas.

By the Governor:
D. A. GREGG,
Secretary of State.

134 *Certificate of D. A. Gregg, Secretary of State of the State of Texas, Accompanying Notice and Suggestion of Abatement.*

Filed January 11th, 1915.

THE STATE OF TEXAS,
Department of State:

I, D. A. Gregg, Secretary of the State of Texas, do hereby Certify that the records of this department show that Hon. F. C. Weinert, of Seguin, Guadalupe County, Texas, was appointed Secretary of State on the 1st day of June A. D. 1913; that he took the constitutional oath of office and filed the necessary bond required by law and assumed the duties of the office of Secretary of State on the 1st day of June A. D. 1913. That he voluntarily resigned on the 21st day of November A. D. 1914, and is no longer connected with this department.

I further certify that Hon. O. B. Colquitt, Governor of the State

of Texas, appointed D. A. Gregg, Secretary of State of the State of Texas on the 21st day of November A. D. 1914; that he took the constitutional oath of office; filed the necessary bond required by law and is now the Secretary of State of the State of Texas, all of which is shown by the records of this Department.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Great Seal of State at my office in the City of Austin, Texas, this the 7th day of January A. D. 1915.

[SEAL.]

D. A. GREGG,
Secretary of State.

135 *Order on Abatement of Suit as to Defendant F. C. Weinert.*

Filed and Entered January 11th, 1915.

In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2782. In Equity.

CRANE COMPANY
vs.
BEN F. LOONEY et al.

On this the 11th day of January A. D. 1915, came the application of the defendant F. C. Weinert, to file a notice of the fact that he had resigned the office of Secretary of State on the 21st day of November A. D. 1914, which application is granted, and the clerk will file said notice, together with the certificates of the Honorable O. B. Colquitt, Governor of Texas, certifying to the facts stated, and a similar certificate of the Honorable D. A. Gregg, Secretary of State of the State of Texas, as a part of the record of this cause.

The court then, upon consideration of said notice and the said certificates, tendered with the same, finds that the defendant F. C. Weinert resigned the office of Secretary of State of the State of Texas on the 21st day of November A. D. 1914, and that his successor, the Honorable D. A. Gregg was appointed Secretary of State of the State of Texas on the same day, and the same day qualified and is now the Secretary of State of the State of Texas.

The court further finds that this suit has abated by reason of the foregoing facts as to the said defendant F. C. Weinert, and he is no longer a party hereto, and no further proceedings will be had herein with reference to him.

E. R. MEEK, *Judge.*

136 *Assignments of Error.*

Filed January 11th, 1915.

In the District Court of the United States of America.

BEN F. LOONEY, Attorney General of the State of Texas, Defendant, Appellant,
vs.
CRANE COMPANY, Plaintiff, Appellee.

And now at the time of filing his petition for appeal and allowance comes Ben F. Looney, Attorney General of the State of Texas, Appellant, and makes and files his assignment of errors, as follows:

I.

The trial court in this cause erred in ordering that the Appellant, Ben F. Looney, Attorney General of the State of Texas, be enjoined and enjoining him from attempting in any wise to enforce against the Appellee, Crane Company, the permit and franchise tax laws of the State of Texas relating to foreign corporations; and from instituting any suit for the collection of any franchise taxes or penalties or any suit to cancel the permit of the said Crane Company to do business in Texas, on the ground that it has failed to pay the fees required by the statutes of the State of Texas for foreign corporations; and from instituting any suit against said Crane Company and to enjoin it from transacting business in the State of Texas, founded on the failure of said Crane Company to pay said permit fees or franchise taxes. Said action was error for the reason that the permit and franchise tax law of the State of Texas referred to in the decree of the court, being Articles 3837 and 7394 of the Revised Statutes of the State of Texas, 1911, do not as a necessary effect impose a burden on the interstate commerce business of the said Crane Company, and do not as a necessary effect exact of the said Crane Company a tax upon property not subject to taxation by the laws of the State of Texas;
137 but said statutes were and are a valid and constitutional exercise of the sovereign authority of the State of Texas governing the admission of Crane Company, a foreign corporation, for the purpose of transacting an intrastate business, and levying in a constitutional way a franchise tax against the said Crane Company, as a foreign corporation, as a condition precedent to its right to transact intrastate business within the State of Texas.

II.

The trial court erred in holding that the collection from Crane Company of a permit fee and franchise taxes under the provisions of Articles 3837 and 7394 of the Revised Statutes of Texas, 1911,

as a necessary effect would impose a burden on the interstate commerce business of the said Crane Company, and as a necessary effect would exact of it a tax upon property not subject to taxation by the State of Texas, and upon such holding entering a decree and granting the injunction against the said Ben F. Looney, Attorney General of the State of Texas, as shown in the decree, for the reason that the permit fees required of foreign corporations under Article 3837 and the franchise taxes required of foreign corporations under Article 7394 of the Revised Statutes of Texas, 1911, are required and exacted only of corporations seeking a permit for and desiring to transact intrastate business within the State of Texas, which class of business the evidence showed that Crane Company, Appellee, was largely engaged in, both as a retail and wholesale merchant and manufacturer; and said Articles in no way impose any burden upon Crane Company in the transaction of its interstate business or impose any tax upon any of its property situated beyond the boundaries of the State of Texas.

III.

The trial court erred in granting the temporary injunction in this case against appellant, Ben F. Looney, Attorney General of the State of Texas, on the ground that Article 3837 of the Revised Statutes of Texas, 1911, was in violation of the Constitution of the United States, in that it imposed a burden on the interstate commerce of the appellee, Crane Company. Said action was error
138 for the reason that said Article of the statutes provides for the collection of a permit fee from each foreign corporation obtaining permit to transact an intrastate business in Texas, measured by its authorized capital stock, to-wit: $50.00 for the first $10,000.00 of its authorized capital stock, and $10.00 for each additional $10,000.00 or fractional part thereof, and in no sense measures such fee by the actual amount of property owned by the corporation or the actual amount of capital paid in; and the exaction of such permit fee from the appellee, Crane Company, for the transaction of its local and domestic business within the State of Texas, which the evidence shows to be real and substantial, is not a burden on the interstate commerce of the appellee, Crane Company.

IV.

The trial court erred in granting the temporary injunction in this case against the appellant, Ben F. Looney, Attorney General of the State of Texas, on the ground that the permit fee exacted of foreign corporations doing an intrastate business in Texas, as set forth in Article 3837 of the Revised Statutes of Texas, 1911, was in violation of the Constitution of the United States, in that it imposed a tax on property situated beyond the boundaries of the State and beyond the lawful taxing power of the State. The action of the court in granting the injunction on the grounds stated was error for the reason that the permit fee required by the statute referred to is not measurer or determined by the amount of property or

apital actually owned by the corporation, but is placed on the mount of its authorized capital; and the exaction of such a permit e from the appellee, Crane Company, as a condition precedent for ie transaction of its local and domestic business within the State f Texas, which the evidence shows to be real and substantial, is not ie taxation of property located beyond the boundaries of the State r the taxation of property beyond the taxing power of the State a violation of the Constitution of the United States.

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V.

The trial court erred in granting the temporary injunction ranted in this cause against the appellant, Ben F. Looney, Attorey General of the State of Texas, on the ground that the franchise axes exacted of foreign corporations by the terms of Article 7394 f the Revised Statutes of Taxes, 1911, as a necessary effect imposed burden on the interstate commerce of appellee, Crane Company. aid action was error for the reason that said Article of the statute nly exacts an annual franchise tax of the appellee for the privilege f transacting an intrastate or local business within the State of exas, and not for the transaction of interstate commerce; and the vidence in this case shows that appellee, Crane Company, is not igaged in operating an instrument of interstate commerce, but an ordinary trading corporation carrying on a local or domestic usiness within the State of Texas, which is real and substantial nd not so connected with interstate commerce as to render the anchise tax prescribed by the Article of the statute referred to a urden upon the interstate business of the appellee, Crane Company.

VI.

The trial court erred in granting the temporary injunction this case against the appellant, Ben F. Looney, Attorney General f the State of Texas, on the ground that Article 7394 of the Reed Statutes of Texas, 1911, prescribing a franchise tax payable r foreign corporations, as a necessary effect exacts a tax on propty situated beyond the boundaries and jurisdiction of the State Texas in violation of the Constitution of the United States. his action of the court was error for the reason that said Article the statute only exacts an annual franchise tax from the appellee r the privilege of transacting an intrastate or local business ithin the State of Texas, and not the transaction of interstate mmerce; and the method prescribed by the statute for deterining the amount of the annual franchise tax is not the levying a tax upon property situated beyond the boundaries of the state, t it is merely a method of determining the amount of an excise x required in order to obtain the right to exercise the franchise of transacting intrastate or domestic business within the

40 State of Texas.

VII.

The trial court erred in holding, in substance, that the intrastate business of the appellee, Crane Company, was inseparably connected with the interstate business of said company in such a manner that the permit fees and franchise taxes exacted of appellee by Articles 3837 and 7394 of the Revised Statutes of Texas, 1911, as a condition precedent to the transaction of intrastate business by said company, and that the exaction of such permit fee and franchise taxes has the necessary effect of imposing a burden on the interstate commerce of appellee and of exacting a tax upon its property not subject to taxation by the laws of the State of Texas. Such holding of the court was error for the reason that there was no evidence that the intrastate business of appellee was so inseparably and intimately connected with its interstate commerce, the evidence showing, in substance, only that appellee transacted a large and profitable wholesale and retail mercantile and manufacturing business in intrastate commerce and that by reason of the transaction of the same its business as a whole was profitable, and that, in the opinion of its manager, who testified in the case, the interstate business of appellee transacted through its Texas branch would not be profitable without the transaction of its intrastate business.

VIII.

The trial court erred in granting the temporary injunction granted in this cause against appellant, Ben F. Looney, Attorney General of the State of Texas, for the reason that the evidence failed to disclose an equitable ground therefor, in this: that the evidence showed that appellee, Crane Company, was conducting, and would continue to conduct, a large wholesale and retail mercantile and manufacturing establishment engaged in intrastate commerce within the State of Texas; that such business was an ordinary mercantile and manufacturing one in the purchase and sale of piping, plumbing materials and other hardware which is sold direct from its establishment in Dallas to the local wholesale and retail
141 trade in the city of Dallas and to the wholesale and retail trade throughout the State of Texas; that its said intrastate business was purely voluntary on its part and not inseparably or necessarily connected with its interstate business; that the appellee is simply an ordinary trading corporation engaged in intrastate business in the State of Texas under a permit previously and voluntarily applied for under the laws of Texas and by virtue of which it was at the time of its trial conducting said intrastate business.

IX.

The trial court erred in granting the decree and injunction against appellant, Ben F. Looney, for the reason that this suit against him was in effect a suit against the State of Texas, without the consent of said State, and brought in violation of the Eleventh Amendment to the Constitution of the United States, in this: that the suit was

brought against the appellant, Ben F. Looney, as Attorney General of the State of Texas, for the purpose of restraining and enjoining him from undertaking in any manner to enforce against Crane Company, or any of its officers, agents, or stockholders, the permit and franchise tax laws of the State of Texas relating to foreign corporations; and from instituting any suit for the collection of any franchise tax or penalties, or any suit to cancel the permit of Crane Company to do business in Texas, on the ground that it had failed to pay the fees required by the laws of Texas for foreign corporations to do business therein; and from instituting any suit against the said Crane Company to enjoin it from transacting business in the State, based on its failure to pay said permit fees or franchise taxes; which said laws authorizing and empowering the said Ben F. Looney, Attorney General of the State of Texas, to do any and all things against the doing of which said injunction was sought,
142 were and are valid and constitutional laws, and not in violation of any rights guaranteed to Crane Company under the Constitution of the United States. Said suit was, therefore, as against the appellant, Ben F. Looney, Attorney General of the State of Texas, one brought to enjoin him from the lawful performance of his duties under valid and constitutional laws, and is in effect one against the State of Texas, without the consent of the State of Texas, in violation of the Eleventh Amendment of the Constitution of the United States.

X.

The trial court erred in not dismissing the bill in this case for the reason that there was pending at the time of the trial a suit between the State of Texas and Crane Company, which had been brought by the State on the 27th day of July A. D. 1914, in one of its own courts, to-wit: in the District Court of Limestone county, Texas, against the appellee, Crane Company, for statutory penalties for violating the Anti-trust laws of the State, for cancellation of its permit to transact intrastate business in the State of Texas, and for an injunction forever enjoining it from doing any business other than interstate business within the State; and in which said suit one of the matters in controversy between the State of Texas and appellee was its right to transact intrastate business in the State of Texas in any event. The appellant, Ben F. Looney, Attorney General, says that the said District Court of Limestone County having taken jurisdiction of said matters in controversy prior to the filing of this suit, its jurisdiction for the determining of the right of the appellee, Crane Company, to transact intrastate business within the State of Texas, was exclusive, and that the same was not at the time of the filing of this suit and at its trial a subject within the jurisdiction and for the determination of the trial court in this case.

Prayer.

Now comes appellant, Ben F. Looney, Attorney General of the State of Texas, and prays for a reversal of the judgment of the District Court of the United States for the Northern District of Texas in this cause, granting a temporary injunction against
143 said appellant; that said judgment granting said injunction be reversed; that said order granting said injunction be vacated and annulled and that this case be ordered dismissed for the errors assigned.

BEN F. LOONEY,
Attorney General, for Himself;
C. A. SWEETON,
C. M. CURETON,
Assistants Attorney General, Attorneys for Ben F. Looney (Defendant), Appellant.

144 *Petition for Appeal and Allowance Thereof.*

Filed January 11th, 1915.

In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2782. Equity.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

The above named defendant, Ben F. Looney, Attorney General, of the State of Texas, conceiving himself aggrieved by the final decree, order and judgment entered in the above entitled cause on December 15th, A. D. 1914, hereby appeals separately from said final judgment, decree and order to the Supreme Court of the United States and he prays that his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

And now at the time of the filing of this petition for appeal the said Ben F. Looney, Attorney General of the State of Texas, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the Supreme Court.

Wherefore, the said Ben. F. Looney, Attorney General of the State of Texas, defendant herein, prays that his appeal be allowed.

BEN F. LOONEY,
Attorney General of the State of Texas, for Himself.
C. A. SWEETON,
C. M. CURETON,
Assistants Attorney General,
Attorneys for Defendant and Appellant Ben F. Looney, Attorney General of the State of Texas.

145 DALLAS, TEXAS, January 11th, A. D. 1915.

And now, to-wit: on this the 11th day of January A. D. 1915, it is ordered that the appeal be allowed as prayed for.

E. R. MEEK,
District Judge.

146 *Appeal Bond.*

Approved and Filed January 12th, 1915.

In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2782. Equity.

CRANE COMPANY
vs.
BEN F. LOONEY, Attorney General, et al.

KNOW All Men by These Presents: That we, Ben F. Looney, Attorney General of the State of Texas, as principal, and National Surety Company, as surety, are held and firmly bound unto Crane Company in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said Crane Company, its successors or assigns, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this the 11th day of January A. D. 1915.

Whereas, lately in Chambers, the United States District Court for the Northern District of Texas, at Dallas, in a suit pending in said court between Crane Company, plaintiff, and Ben F. Looney Attorney General of the State of Texas, et al., a decree was rendered against the said Ben F. Looney, Attorney General of the State of Texas defendant, and

Whereas, the above named Ben F. Looney, Attorney General of the State of Texas, has prosecuted an appeal to the Supreme Court of the United States to reverse said decree rendered in the above entitled suit,

Now therefore, the condition of this obligation is such that if the above named Ben F. Looney, Attorney General of the State of Texas, shall prosecute said appeal to effect and answer all
147 damages and costs if he fails to make said appeal good, then this obligation shall be void, otherwise, same shall remain in full force and virtue.

BEN F. LOONEY,
Attorney General of the State of Texas, Defendant, Principal.
NATIONAL SURETY COMPANY,
[SEAL.] By C. H. VERSCHOYLE,
Attorney in Fact, Surety.

Approved:
E. R. MEEK,
United States District Judge.

148 *Waiver of Issuance and Service of Citation on Appeal.*

Filed January 12th, 1915.

In the District Court of the United States for the Northern District of Texas, at Dallas.

No. 2782. In Equity.

CRANE COMPANY
vs.
BEN F. LOONEY et al.

Comes now Crane Company, by its solicitors herein, and waives the issuance of citation on appeal, and agrees to appear and otherwise act herein as though citation had been issued and served upon it.

ETHERIDGE, McCORMICK & BROMBERG,
Attorneys for Crane Company, Complainant.

Endorsed: No. 2782 in Equity. Crane Company vs. Ben F. Looney et al. Waiver of issuance of citation and service thereof. Filed 12 day of Jan. 1915. Louis C. Maynard, Clerk. By E. C. Van Dusen, Deputy.

149 *Agreement as to Contents of Record on Appeal.*

Filed January 11th, 1915.

In the District Court of the United States for the Northern District of Texas.

No. 2782. In Equity.

CRANE COMPANY
vs.
BEN F. LOONEY et al.

The parties hereto waiving præcipe, have agreed that the following documents shall constitute the record on appeal:

1st. Complainant's bill.
2nd. Order for hearing on application for interlocutory injunction.
3rd. Defendants' answer.
4th. Complainant's supplemental bill.
5th. Defendants' supplemental answer.
6th. Opinion of the court.
7th. Decree of the court.
8th. Bill of Exceptions.
9th. Notice of resignation and suggestion of abatement as to defendant F. C. Weinert.

10th. Certificate of Governor Colquitt.
11th. Certificate of Secretary of State Gregg.
12th. Order of court abating suit as to defendant F. C. Weinert.
13th. Assignments of error of the defendant Ben F. Looney, Attorney General.
14th. Petition for appeal and allowance thereof.
15th. Appeal bond of Ben F. Looney, Attorney General.
16th. Waiver of issuance of citation on appeal.
17th. Agreement as to papers composing record.
18th. Cost bill.
19th. Certificate of Clerk.

ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Complainant.

BEN F. LOONEY, *Attorney General;*
150 C. A. SWEETON,
C. M. CURETON,
Assistants Attorney General,
Solicitors for Defendant Ben F. Looney et al.

151 *Clerk's Certificate.*

I, Louis C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignments of error, and all proceedings had upon the hearing of the complainant's application for interlocutory injunction in cause No. 2782 in Equity, wherein Crane Company is complainant and Ben F. Looney, Attorney General of the State of Texas et al., are defendants, as fully as the same remain on file and of record in my office at Dallas, Texas.

Witness my hand officially, and the seal of said District Court, at Dallas, Texas, this the 5th day of February A. D. 1915.

[The seal of the U. S. District Court, Northern Dist. Texas, Dallas.]

LOUIS C. MAYNARD,
Clerk of said Court.

Endorsed on cover: File No. 24,562. N. Texas D. C. U. S. Term No. 531. Ben F. Looney, Attorney General of the State of Texas, appellant, vs. Crane Company. Filed February 16th, 1915. File No. 24,562.

INDEX.

CASES CITED AND DISCUSSED.

A164-1115-60

No. 351.

IN THE

Supreme Court of the United States of America.

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, APPELLANT,

vs.

CRANE COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is a suit in equity brought by the Crane Company, an Illinois corporation, against Ben F. Looney, as Attorney General of the State of Texas, and F. C. Weinert, as Secretary of State of the State of Texas, for the purpose of restraining them in their official capacities from enforcing against the appellee (plaintiff below) the provisions of Articles 3837 and 7394 of the Revised Statutes of Texas (1911), these articles of the statute being the ones regulating the permit fees and franchise taxes to be paid by foreign corporations desiring to transact an intrastate business in the State of Texas. (Transcript of Record, p. 1.)

The bill of complaint was presented to the Hon. Edward R. Meek, United States District Judge for the Northern District of Texas, on the 6th day of November, A. D. 1914, and it appearing that an interlocutory injunction was sought restraining the action of certain State officers named as defendants in the enforcement and execution of certain statutes of the State of Texas

he called to his assistance the Hon. Richard W. Walker, United States Circuit Judge for the Fifth Circuit, and the Hon. Rydon N. Call, United States District Judge for the Northern District of Florida, who consented to serve in that capacity. (Transcript of Record, p. 13.)

Judge Meek upon the presentation of the bill ordered that the application for interlocutory injunction be set down for hearing before the three judges named on November 13, 1914, and directed the issuance of the proper notices in conformity with the Judicial Code of the United States. (Transcript of Record, p. 13.)

The hearing on the application for interlocutory injunction was heard on the 13th day of November, A. D. 1914, before Judge Meek and the two judges called to his assistance heretofore named. (Transcript of Record, p. 1.)

The application was heard on the pleadings and evidence hereafter abstracted and afterwards on December 21, 1914, an order was entered granting the interlocutory injunction prayed for. (Transcript of Record, p. 59.)

The interlocutory injunction was granted against F. C. Weinert, as Secretary of State of the State of Texas, as well as against Ben F. Looney, Attorney General of the State. (Transcript of Record, p. 61.)

But afterwards on the 11th day of January, A. D. 1915, proper and sufficient evidence was presented to the court that F. C. Weinert, formerly Secretary of State of the State of Texas, had vacated his office and another, towit, the Hon. D. A. Gregg, had been appointed Secretary of State of the State of Texas, and had qualified and entered upon the duties of that office. (Transcript of Record, pp. 62 and 63.)

Whereupon the court entered an order abating the suit as to the said F. C. Weinert and directed that no further proceedings should be had with reference to him. (Transcript of Record, p. 64.)

Exception was reserved to the action of the court in granting the temporary injunction against the defendants, F. C. Weinert, Secretary of State, and Ben F. Looney, Attorney General, and at the same time notice of appeal from the order to the Supreme Court of the United States was given in open court. (Transcript of Record, p. 61.)

The appellant, Ben F. Looney, Attorney General of the State

of Texas, filed his assignments of error (Transcript of Record, p. 65), presented and had allowed his petition for appeal (Transcript of Record, pp. 70 and 71), gave a proper appeal bond (Transcript of Record, p. 71), and in all things perfected his appeal in this cause.

Since the action is abated as to F. C. Weinert, Secretary of State, we will not encumber this abstract and brief with any reference to his pleadings or any action taken concerning him, except where unavoidable.

It appears from appellee's bill of complaint and from the evidence that under its charter it is engaged in the business of manufacturing, buying, selling and otherwise dealing in various lines of hardware, steam goods, builders' supplies and material, and piping and plumbers' supplies; that more than twenty years ago it entered the State of Texas with its goods, wares and merchandise, selling them through traveling salesmen, who took orders and sent them to its principal office and place of business in Chicago, Illinois, for acceptance and filling through shipment. That it received, accepted and filled orders sent it through the mails from merchants living in Texas, and that for many years it has been engaged in interstate commerce between Texas and other States of the Union. In the bill of complaint it was also alleged that for the purpose of facilitating the transaction of its business, and in order that it might more conveniently serve those with whom it transacted such commerce it established agencies throughout the country, one of which has been established in Dallas, Texas, since 1904. It likewise appears that during the year 1905 appellee applied for and secured from the State of Texas a permit to do business within the State for the succeeding ten years and that during the time intervening between the year 1906 and the filing of the bill in this case appellee has conducted an extensive interstate and intrastate business, and has made permanent investments in the city of Dallas, Texas, in the way of a lot, building and equipment for the more efficient and economical conduct of its business. It was alleged and shown that appellee's permit to do an intrastate business in Texas would expire on the 15th day of January, 1915, and appellee averred that it would not apply to the Secretary of State for a renewal of this permit, nor meet the conditions in any way by the payment of necessary fees to secure such permit; that it would not at the expiration of its present franchise tax on May

1, 1915, pay a franchise tax in compliance with the laws of the State for the fiscal year ending May 1, 1916. The complaint alleged further that the appellant and his co-defendant, the Secretary of State, would undertake to enforce the laws of the State of Texas against it and that it would thereby be harassed, annoyed and impeded in the transaction of its business in interstate commerce and in the business inseparably connected therewith and that it would be ousted from doing an intrastate business in the State of Texas. In the complaint and trial of the case the appellee assailed the validity of Articles 3837 and 7394 of the Revised Statutes of Texas (1911) and alleged that their provisions were, in violation of the rights of appellee, guaranteed to it under the Constitution of the United States, Article 1, Section 8, paragraph 4, which among other things grants to Congress the power to regulate commerce among the several States and under the first section of the Fourteenth Amendment of the Constitution of the United States, which guaranteed it (appellee) against being deprived by any State of its property without due process of law and against being deprived of the equal protection of the law. The part of Article 3837 applicable to appellee and complained of by it is as follows:

"*For* each foreign corporation obtaining permit to do business in this State shall pay fees as follows: Fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this State shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, so-called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each additional one hundred thousand dollars, or a fractional part thereof; and, where the company is a foreign one, then the fee shall be based upon the capital invested in the State of Texas. (Acts 1907, S. S., p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p. 87. Acts 1883, p. 72. Acts 1909, S. S., p. 267.)"

Article 7394 is as follows:

"Art. 7394. Tax to be Paid by Foreign Corporations.—Except as herein provided, each and every foreign corporation authorized, or that may hereafter be authorized to do business in this State, shall on or before the first day of May of each year pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows, viz.: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars or fractional part thereof, of the authorized capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten million dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars. (Act 1907, p. 503, Sec. 2.)"

The foregoing statement may be considered as a condensation of the case made by pleadings of the appellee and the evidence relative thereto, and is a substantial paraphrase of the statement of the case made by Judge Meek, one of the trial judges, in the memorandum opinion filed in this case. (Transcript of Record, pp. 55 to 57.)

The appellant and his co-defendant, the Secretary of State, pleaded the constitutionality of the statutes assailed (Transcript of Record, p. 14), that appellee was engaged in intrastate commerce (Transcript of Record, pp. 14, 15 and 16). They likewise pleaded that appellee was engaged in the transaction of intrastate commerce as permitted and authorized by its permit, and that the same was not incidental nor so closely related to its interstate commerce as that it could not be separated therefrom without burdening such interstate commerce. (Transcript of Record, p. 16, paragraph 10.) Appellants likewise pleaded that the statutes assailed being constitutional the suit was in effect one against the State and being brought without the State's consent and should be dismissed. (Transcript of Record, p. 14.)

FINDINGS IN THE DECREE BY THE JUDGES.

In the decree entered by the trial judges in this cause is found the findings on the facts put in issue by the pleadings as follows:

"That the plaintiff, Crane Company, under its charter, is engaged in the business of manufacturing, buying, selling and otherwise dealing in various lines of hardware, builders' supplies and material, and agricultural machinery and supplies; that more than twenty years ago plaintiff, Crane Company, entered the State of Texas with its goods, wares and merchandise, selling them through traveling salesmen who took orders and sent them to the plaintiff's principal office and place of business at Chicago, Illinois, for acceptance and filling through shipment; that plaintiff, Crane Company, received, accepted and filled orders sent it through the mails from merchants living in Texas; that for many years plaintiff, Crane Company, has been engaged in interstate commerce between Texas and the other States of the Union; that for the purpose of facilitating the transaction of its business and in order that it might the more conveniently serve those with whom it transacted said interstate commerce, Crane Company established agencies throughout the country, one of which was an agency established at Dallas, Texas, in 1904.

That during the year 1905 plaintiff, Crane Company, applied for and secured from the Secretary of State of the State of Texas a permit to do business within the State for the succeeding ten years; that during the time intervening between the year 1906 and the time of the filing of plaintiff's bill it has conducted

an extensive interstate and intrastate business and has made permanent investments in the city of Dallas, Texas, in the way of a lot, building and equipment for the more efficient and economical conduct of such business; that plaintiff's permit to do an intrastate business in the State of Texas expires on the 15th day of January, 1915, and that the period covered by plaintiff's present franchise tax expires on May 1, 1915, and that plaintiff, Crane Company, will not apply for a permit on or after January 15, 1915, nor pay a franchise tax on or after May 1, 1915; that the defendants, the Attorney General and the Secretary of State, will undertake to enforce the permit and franchise tax laws against Crane Company unless enjoined, and that the enforcement of the provisions of such laws by the defendants in their official capacities will annoy, harass, and impede plaintiff in its business in interstate commerce and its intrastate business inseparably connected therewith and oust Crane Company from doing an intrastate business in Texas; that the collection from plaintiff by the Secretary of State of taxes under the provisions of Articles 3837 and 7394 of the Revised Statutes of Texas, 1911, as a necessary effect, will impose a burden on the interstate commerce business of the plaintiff and, as a necessary effect, will exact of the plaintiff a tax upon property not subject to taxation by the State of Texas." (Transcript of Record, pp. 60 and 61.)

On the pleadings and evidence introduced, the trial judges concluded as a matter of law that the interlocutory injunction should issue as prayed for. (Transcript of Record, p. 61.)

The injunction was ordered to issue against both the appellant, Ben F. Looney, Attorney General of the State, and his co-defendant, F. C. Weinert, as Secretary of State of the State of Texas, but since the suit is abated as to the latter we will only give the substance of the decree as to the former, which was as follows:

"It is therefore ordered that the defendant, Ben F. Looney, as Attorney General of the State of Texas, be and he is hereby enjoined, until further order of this court, from attempting in anywise to enforce against the plaintiff, Crane Company, the permit and franchise tax laws of the State of Texas relating to foreign corporations and from instituting any suit for the collection of any franchise taxes or penalties, or any suit to cancel the permit of the plaintiff to do business in Texas on the ground that it has failed to pay the fees required by the statutes of the State of Texas from foreign corporations doing business therein, and

from instituting any suit against the plaintiff to enjoin it from transacting business in the State of Texas founded on the failure of the plaintiff to pay said permit fees or franchise taxes." (Transcript of Record, p. 61.)

NOTE.—The interlocutory decree referred to is published in full at page — of this brief, and the memorandum opinion rendered by Judge Meek, one of the judges trying the case, is published at page — of this brief for convenience. Revised Statutes of Texas, 1911, Articles 3837 and 7394, being the principal ones attacked by appellee, have already been quoted in this statement, but the entire permit fee statutes relating to foreign corporations and franchise statutes and all collateral laws necessary to be considered in this discussion are printed in this brief on pages — to —, as a matter of convenience to the court in dealing with the issues in this cause.

BRIEF OF THE ARGUMENT.

APPELLANT'S SPECIFICATIONS OF ERROR.

The appellant adopts his assignments of error as his specifications of error, and presents the same as follows, towit:

I.

The trial court in this cause erred in ordering that the appellant, Ben F. Looney, Attorney General of the State of Texas, be enjoined and enjoining him from attempting in anywise to enforce against the appellee, Crane Company, the permit and franchise tax laws of the State of Texas relating to foreign corporations; and from instituting any suit for the collection of any franchise taxes or penalties or any suit to cancel the permit of the said Crane Company to do business in Texas, on the ground that it has failed to pay the fees required by the statutes of the State of Texas for foreign corporations; and from instituting any suit against said Crane Company and to enjoin it from transacting business in the State of Texas, founded on the failure of said Crane Company to pay said permit fees or franchise taxes. Said action was error for the reason that the permit and franchise tax law of the State of Texas referred to in the decree of the court, being Articles 3837 and 7394 of the Revised Statutes of

he State of Texas, 1911, do not as a necessary effect impose a urden on the interstate commerce business of the said Crane ompany, and do not as a necessary effect exact of the said Crane ompany a tax upon property not subject to taxation by the ws of the State of Texas; but said statutes were and are a alid and constitutional exercise of the sovereign authority of the tate of Texas governing the admission of Crane Company, a for-gn corporation, for the purpose of transacting an intrastate usiness, and levying in a constitutional way a franchise tax gainst the said Crane Company, as a foreign corporation, as a ondition precedent to its right to transact intrastate business ithin the State of Texas. (Transcript of Record, p. 65.)

II.

The trial court erred in holding that the collection from Crane ompany of a permit fee and franchise taxes under the provi-ons of Articles 3837 and 7394 of the Revised Statutes of Texas, 911, as a necessary effect would impose a burden on the inter-ate commerce business of the said Crane Company, and as a ecessary effect would exact of it a tax upon property not sub-ct to taxation by the State of Texas, and upon such holding ntering a decree and granting the injunction against the said en F. Looney, Attorney General of the State of Texas, as shown the decree, for the reason that the permit fees required of oreign corporations under Article 3837 and the franchise taxes quired of foreign corporations under Article 7394 of the Re-sed Statutes of Texas, 1911, are required and exacted only of rporations seeking a permit for and desiring to transact intra-ate business within the State of Texas, which class of business e evidence showed that Crane Company, appellee, was largely gaged in, both as a retail and wholesale merchant and manu-cturer; and said articles in no way impose any burden upon rane Company in the transaction of its interstate business or npose any tax upon any of its property situated beyond the undaries of the State of Texas. (Transcript of Record, pp. 5 and 66.)

III.

The trial court erred in granting the temporary injunction in is case against appellant, Ben F. Looney, Attorney General of e State of Texas, on the ground that Article 3837 of the Re-

vised Statutes of Texas, 1911, was in violation of the Constitution of the United States, in that it imposed a burden on the interstate commerce of the appellee, Crane Company. Said action was error for the reason that said article of the statutes provides for the collection of a permit fee from each foreign corporation obtaining permit to transact an intrastate business in Texas, measured by its authorized capital stock, towit: $50 for the first $10,000 of its authorized capital stock, and $10 for each additional $10,000 or fractional part thereof, and in no sense measures such fee by the actual amount of property owned by the corporation or the actual amount of capital paid in; and the exaction of such permit fee from the appellee, Crane Company, for the transaction of its local and domestic business within the State of Texas, which the evidence shows to be real and substantial, is not a burden on the interstate commerce of the appellee, Crane Company. (Transcript of Record, p. 66.)

IV.

The trial court erred in granting the temporary injunction in this case against the appellant, Ben F. Looney, Attorney General of the State of Texas, on the ground that the permit fee exacted of foreign corporations doing an intrastate business in Texas, as set forth in Article 3837 of the Revised Statutes of Texas, 1911, was in violation of the Constitution of the United States, in that it imposed a tax on property situated beyond the boundaries of the State and beyond the lawful taxing power of the State. The action of the court in granting the injunction on the grounds stated was error for the reason that the permit fee required by the statute referred to is not measured or determined by the amount of property or capital actually owned by the corporation, but is placed on the amount of its authorized capital; and the exaction of such a permit fee from the appellee, Crane Company, as a condition precedent for the transaction of its local and domestic business within the State of Texas, which the evidence shows to be real and substantial, is not the taxation of property located beyond the boundaries of the State or the taxation of property beyond the taxing power of the State in violation of the Constitution of the United States. (Transcript of Record, pp. 66 and 67.)

V.

The trial court erred in granting the temporary injunction granted in this cause against the appellant, Ben F. Looney, Attorney General of the State of Texas, on the ground that the franchise taxes exacted of foreign corporations by the terms of Article 7394 of the Revised Statutes of Texas, 1911, as a necessary effect imposed a burden on the interstate commerce of appellee, Crane Company. Said action was error for the reason that said article of the statute only exacts an annual franchise tax of the appellee for the privilege of transacting an intrastate or local business within the State of Texas, and not for the transaction of interstate commerce; and the evidence in this case shows that appellee, Crane Company, is not engaged in operating an instrument of interstate commerce, but is an ordinary trading corporation carrying on a local or domestic business within the State of Texas, which is real and substantial and not so connected with interstate commerce as to render the franchise tax prescribed by the article of the statute referred to a burden upon the interstate business of the appellee, Crane Company. (Transcript of Record, p. 67.)

VI.

The trial court erred in granting the temporary injunction in this case against the appellant, Ben F. Looney, Attorney General of the State of Texas, on the ground that Article 7394 of the Revised Statutes of Texas, 1911, prescribing a franchise tax payable by foreign corporations, as a necessary effect, exacts a tax on property situated beyond the boundaries and jurisdiction of the State of Texas in violation of the Constitution of the United States. This action of the court was error for the reason that said article of the statute only exacts an annual franchise tax from the appellee for the privilege of transacting an intrastate or local business within the State of Texas, and not the transaction of interstate commerce; and the method prescribed by the statute for determining the amount of the annual franchise tax is not the levying of a tax upon property situated beyond the boundaries of the State, but it is merely a method of determining the amount of an excise tax required in order to obtain the right to exercise the franchise of transacting intra-

state or domestic business within the State of Texas. (Transcript of Record, p. 67.)

VII.

The trial court erred in holding, in substance, that the intrastate business of the appellee, Crane Company, was inseparably connected with the interstate business of said company in such a manner that the permit fees and franchise taxes exacted of appellee by Articles 3837 and 7394 of the Revised Statutes of Texas, 1911, as a condition precedent to the transaction of intrastate business by said company, and that the exaction of such permit fee and franchise taxes has the necessary effect of imposing a burden on the interstate commerce of appellee and of exacting a tax upon its property not subject to taxation by the laws of the State of Texas. Such holding of the court was error for the reason that there was no evidence that the intrastate business of appellee was so inseparably and intimately connected with its interstate commerce, the evidence showing, in substance, only that appellee transacted a large and profitable wholesale and retail mercantile and manufacturing business in intrastate commerce and that by reason of the transaction of the same its business as a whole was profitable, and that, in the opinion of its manager, who testified in the case, the interstate business of appellee transacted through its Texas branch would not be profitable without the transaction of its intrastate business. (Transcript of Record, p. 68.)

VIII.

The trial court erred in granting the temporary injunction granted in this cause against appellant, Ben F. Looney, Attorney General of the State of Texas, for the reason that the evidence failed to disclose an equitable ground therefor, in this: that the evidence showed that appellee, Crane Company, was conducting, and would continue to conduct, a large wholesale and retail mercantile and manufacturing establishment engaged in intrastate commerce within the State of Texas; that such business was an ordinary mercantile and manufacturing one in the purchase and sale of piping, plumbing materials and other hardware which is sold direct from its establishment in Dallas to the local wholesale and retail trade in the city of Dallas and to the wholesale and retail trade throughout the State of Texas; that

its said intrastate business was purely voluntary on its part and not inseparably or necessarily connected with its interstate business; that the appellee is simply an ordinary trading corporation engaged in intrastate business in the State of Texas under a permit previously and voluntarily applied for under the laws of Texas and by virtue of which it was at the time of its trial conducting said intrastate business. (Transcript of Record, p. 68.)

IX.

The trial court erred in granting the decree and injunction against appellant, Ben F. Looney, for the reason that this suit against him was in effect a suit against the State of Texas, without the consent of said State, and brought in violation of the Eleventh Amendment to the Constitution of the United States, in this: that the suit was brought against the appellant, Ben F. Looney, as Attorney General of the State of Texas, for the purpose of restraining and enjoining him from undertaking in any manner to enforce against Crane Company, or any of its officers, agents, or stockholders, the permit and franchise tax laws of the State of Texas relating to foreign corporations; and from instituting any suit for the collection of any franchise tax or penalties, or any suit to cancel the permit of Crane Company to do business in Texas, on the ground that it had failed to pay the fees required by the laws of Texas for foreign corporations to do business therein; and from instituting any suit against the said Crane Company to enjoin it from transacting business in the State, based on its failure to pay said permit fees or franchise taxes; which said laws authorizing and empowering the said Ben F. Looney, Attorney General of the State of Texas, to do any and all things against the doing of which said injunction was sought, were and are valid and constitutional laws, and not in violation of any rights guaranteed to Crane Company under the Constitution of the United States. Said suit was, therefore, as against the appellant, Ben F. Looney, Attorney General of the State of Texas, one brought to enjoin him from the lawful performance of his duties under valid and constitutional laws, and is in effect one against the State of Texas, without the consent of the State of Texas, in violation of the Eleventh Amendment of the Constitution of the United States. (Transcript of Record, pp. 68 and 69.)

STATEMENT UNDER THESE SPECIFICATIONS OF ERROR.

While the specifications of error and assignments relied on are nine in number, yet they all complain substantially of the same fundamental error of the trial judges, each presenting the error of the court from a different angle or viewpoint. As heretofore shown, the judges concluded as a matter of law that the interlocutory injunction should issue as prayed for. (Transcript of Record, p. 61.)

The court also concluded that the enforcement of the provisions of the permit fee and franchise tax laws of the State of Texas against appellee will annoy, harass and impede it in its business in interstate commerce and in its intrastate business inseparably connected therewith and oust it from doing an intrastate business in Texas: that the collection from appellee of the taxes and permit fees provided by Articles 3837 and 7394 of the Revised Statutes of Texas, 1911, as a necessary effect would harass and burden the interstate commerce business of appellee, and as a necessary effect would exact of appellee a tax upon property not subject to taxation by the State of Texas. (Transcript of Record, pp. 60 and 61.)

The errors complained of are assigned on these conclusions and the action of the court based thereon, as shown by appellant's several assignments of error, which are submitted above as specifications of error. (Transcript of Record, pp. 65 to 69, inclusive.)

The appellant pleaded that suit was brought against him as Attorney General of the State to enjoin him from enforcing valid and constitutional laws of the State and that it was therefore in effect a suit against the State. (Transcript of Record, p. 14.)

The ninth specification of error presents this error of the trial court in entering the decree against appellant, which issue was presented by the pleading referred to.

It is necessary that an understanding of the facts of this case be had in order that we may properly present and dispose of the propositions of law to follow, and we take occasion here to make an excerpt from the statement of facts as briefly as an understanding of the issues will permit.

ABSTRACT OF EVIDENCE.

J. E. Ludlow, the manager of the appellee's branch in Texas, being introduced as a witness for appellee testified, in substance, that the capital of the company was $17,000,000, and its surplus and undivided profits $8,139,000; that he had been connected with the company fourteen years and was with it before the Dallas agency was opened. That the company had been engaged in the business of shipping goods in Texas on orders sent to it from Texas for nineteen years; that, before the office was opened in Dallas it was conducted by having two salesmen from the St. Louis office travel over the State and solicit business, and that much business was also received direct by mail or telegram. In 1904 the appellee established an agency in Dallas, Texas, since which time its business has been done through the Dallas branch. (Transcript of Record, p. 28.)

It is stated further that the business of appellee consisted of merchandising such goods as it manufactured at Chicago, piping and tubing from Pittsburg, Pennsylvania, and miscellaneous plumbing goods in the way of bath tubs and all sorts of plumbing fixtures and steam goods from various parts of the country. (Transcript of Record, p. 28.)

Concerning the method of appellee in operating its business, this witness further said:

"We handle these articles as jobbers. In 1913, our stock of goods in Dallas amounted to $163,277 in merchandise. That would vary somewhat from time to time, but not materially. We made shipments from that stock in the following manner; take piping, for example: All sizes of pipe up to and including one and one-half inch came to us in bundles, containing from three to seven pieces to the bundle; all sizes larger than that come to us in pieces, usually billed out at so many feet per piece. Bath tubs, lavatories and practically all of the plumbing fixtures as well as their trimmings come to us done up in bundles, which we don't have to break in order to complete an order—do not have to change it, in other words, from the way we receive it. Goods which we ourselves manufacture, with the exception of the smaller pieces—and by that I mean two inches and smaller, or individual pieces, when we receive a carload of goods from Chicago, it is put loose in the car and we handle it that way; we ship it out the same way we receive it. Approximately 75 per

cent of the business we do from our Dallas and Texas City stock is shipped in the same shape in which we receive it. During the year 1913, $649,136 of business was done through our Dallas and Texas City houses, in the way I have indicated. Approximately one-fourth of the business is sold in broken packages and three-fourths of it in unbroken packages."

This witness testified further in substance that appellee had nine salesmen in Texas, two of them being confined strictly to Dallas, and that all of them are in Texas. That these salesmen take orders for anything the company gives them a price on for shipment either out of Dallas or Texas City stock or direct from the factories. These salesmen take the orders and send them to Dallas, and the Dallas branch orders the material shipped from whatever source is most advantageous. If it is from the factory they are shipped direct from the factory; if the goods are ordered to be shipped from Dallas or Texas City, they are shipped from these points. If the goods are not to be shipped from these places named, then the order is sent to the source of supply, and the shipment made therefrom, the article going direct in point of shipment; that is, it does not come to Dallas or Texas City for reshipment. These salesmen send no orders directly outside of the State, but they are all sent to the company's branch at Dallas. (Transcript of Record, p. 29.)

For the year 1913 the gross sales of appellee amounted in total to $39,831,000. It did a business of $1,019,750 in the State of Texas from the Dallas office. (Transcript of Record, p. 29.)

Appellee has never conducted any manufacturing business in Texas, though it manufactures certain goods in its Northern plant. (Transcript of Record, p. 29.)

It was shown by the testimony of this witness that appellee owned a building at Dallas 110 by 197 feet, five stories high, which was constructed for the purpose of and is particularly adapted to appellee's business. (Transcript of Record, p. 30.)

In 1913 appellee had property in Texas valued at $301,179—consisting of cash, $4500; real estate, $30,000; buildings, $91,-520; furniture and fixtures, $11,882, and merchandise $163,277. (Transcript of Record, p. 30.)

Concerning the use of its property and buildings and its method of handling its business, this witness in part said:

"We use this house and these facilities exclusively for the handling of our business—business of Crane Company. We

don't use any different part of the property for filling local orders from that part used for filling orders to go outside of the State. We have something over forty employes in the house at present—forty-two or forty-three; they consist of salesmen, bookkeepers, stenographers, bill clerks, shipping clerks, teamsters, and myself as manager. This force is not divided up into those who do the local business and those who do business outside of the State; they are all used indiscriminately. The Dallas house was built primarily for the purpose of increasing the distribution of goods which we ourselves manufacture at our Northern plants; in connection with that distribution we have also continued to handle goods of other manufacturers. We have salesmen traveling throughout the State for the purpose of taking orders for that business. Some of that business is on orders sent outside of the State; some of it is filled in unbroken packages and some is filled by shipments of broken packages."

In the progress of his examination the witness was asked by appellee's counsel this question:

"Q. What effect would it have on the interstate portion of your business, that business passing over the State line—what effect would it have on that business if Crane Company could not do a broken package business out of the Dallas house?"

In answer to this question, after objection having been made by appellant's counsel and the objection noted by the court, the witness answered as follows:

"The Crane Company could not do the volume of business they have done since it has been in the State with the branch house, at a profit; it would be at a loss. I say that because I am familiar with all the costs of doing business in the State and know what our gross profits are; if we didn't have business that we could ship direct from our own or other factories that we handle on a smaller margin of cost than we do that which we have in Texas City and Dallas, we could not make our expenses. If we were cut off from doing the interstate part of our business, we could not make expenses of handling our local business—not on the business we do. It is beneficial to our business to be placed where we can supply purchasers with goods in broken packages for local distribution; if that was withdrawn from our general business, I don't see how we could maintain a house in the State—could not do business in the State. It would be hurtful to the interstate business to withdraw our privilege of doing

a local business—selling out of broken packages. Our gross profits for the year 1913 were 20.13 per cent of our total business in Texas from the Dallas house. If we charge 5 per cent on the investment on real estate, building and fixtures, our net profit would be 5.18 per cent. The average profit for the past nine years has been—gross, 19.48; net, 4.47½ per cent." (Transcript of Record, pp. 30 and 31.)

On Cross Examination.

On cross examination this witness continued his testimony as to the method of storing and handling goods in appellee's Dallas building, and in part said:

"This building, to which I referred, is constructed for the handling of goods in original packages. We keep large quantities of goods there in the same packages in which they are shipped to us; we also keep large quantities of goods there in broken packages on our shelves; those in the packages in which they were shipped and those in broken packages are placed on the shelves in the store room for sale to the public—on the shelves and throughout the house. If we receive a carload of bath tubs, for instance, properly crated, we place them in the house to sell to any person who may come there or send in their order. The uncrated goods are placed in our store room, and, when placed there, ordinarily are not goods that have been ordered by particular parties, but ordered by us to maintain our stock and keep it on hand for sale to the trade.

"A crate containing a bath tub does not contain anything else; the fixtures and smaller articles that go to complete the tub do not come in the crate; the chain, rubber stopper and parts that go to make it complete—waste and overflow, are not in the original package, but in separate packages. The valves, which let the water in, those are all in separate packages—not in the original package, but in a different package entirely. These are brought to our store and placed there—they are placed in the warehouse, we don't expose them for sale, much. We sell to people throughout the State who deal in that character of wares. We don't do a retail business, we do a wholesale business; our store should be considered more as a warehouse than anything else. When goods are shipped to our house at Dallas they are not paid for by our house; they are paid for by our Chicago

house; the bills are paid in Chicago for all merchandise that come to us. They are charged against the Texas business on the books of the company; they are not charged on our books; the Crane Company accounting department takes care of our accounts payable.

"In addition to bath tubs and the various attachments that go with bath tubs, we handle steam fittings, valves, and things of that character. These goods are brought in with the balance of the goods in our house and sold to the public generally; that is, the public that we have dealings with generally. They are put in the house for that purpose; we manufacture valves; we don't manufacture steam engines; we don't manufacture pipe, we buy that; we buy all the pipe that we sell at Dallas; that does not come from our company, but from an independent company entirely; it comes from the National Tube Company, Pittsburg, Pennsylvania. It is true that this pipe from the National Tube Company is sent to us on consignment, and we sell it to the trade in Texas generally, on commission; we are paid by a per cent for our sales. With reference to our supply of sewer pipe: We buy that the same as any other merchandise, from various sources. We don't assemble that at the Dallas office, we sell it the same as we get it; we bring it and resell it—reship it; it is shipped as we receive it. The other pipe, as I stated, comes to us put up—up to and including an inch and a half in size, in bundles. This pipe comes to us in bundles and packages—it comes wired together and it is shipped and specified—billed, as bundle. It is put up in bundles containing from three to seven pieces, according to size, tied in three or four different places. That is put in the warehouse and, when a party orders it, it is shipped in the original package, original bundle. If an order calls for a little over or a little under, we send the bundle, so as not to break the package; if the order was too small, we would break the package; and send it; we keep that pipe there for that purpose. This house at Dallas is well constructed for the purpose of keeping goods there in the original package and selling in original packages; it is especially constructed for carrying such goods as we handle. The Texas house sold and shipped out from Texas something over $600,000 worth of goods last year—at Dallas and Texas City. Of that amount it is estimated that $163,000 worth, and a little over, was in broken packages; the balance was goods shipped in unbroken packages, taken out of the ware-

house after they had been placed there in the manner I have just described; this $600,000 worth of goods from the Texas houses was shipped to our trade generally throughout Texas, on orders received by the house through mail, telegram or through our traveling solicitors. These traveling solicitors take orders for shipments of goods in broken quantities as well as in larger quantities. The practice of our company is, where a carload shipment is made to points outside of Dallas, to send the order to Chicago and have the shipment made from the point of origin direct to the point of destination, in order to secure the benefit of the common point rate. The carload order is sent in by us from Dallas, and is credited to the Dallas house." (Transcript of Record, pp. 32 and 33.)

The witness further testified that at the Dallas house appellee maintained machinery for cutting threads on pipe when it receives orders of that character in the Texas trade. That they had four machines for this purpose and employed two men in that department; that he could not say what quantity of pipe is threaded and shipped, but that they did not cut and thread all the pipe that was sold; that appellee did not cut and thread 3 per cent of it; that if a man wants a piece of pipe a certain length and the house does not have it that length it has it cut and threads it for him. That the purpose of cutting and threading it is to prepare it for the trade. (Transcript of Record, p. 33.) That a little charge was made for the service, which varies with the size of the pipe. (Transcript of Record, p. 34.)

Concerning the shipment of merchandise in broken packages the witness further testified that appellee crated it to a certain extent, and for such purpose manufactured crates in a limited way, but it only manufactured crates for its own use. (Transcript of Record, p. 34.)

The witness further testified: "We buy and sell goods and ship them out in the State generally. * * * It is true that we do an open account business in Dallas, right over the counter; we sell to plumbers and users of steam goods. A part of our line we sell direct to the retail trade; we sell sewer pipe and little trinkets for insulating, etc., and that character of stuff to most anybody that comes in, inside of Dallas or outside of Dallas; we would not ask them where they were from, if they had the money to pay for it. If they send in an order, we sell it to them. We do solicit that class of business throughout the State

to a certain extent; we do that about on the same plan that we make Dallas sales,—about the same plan; that is, we sell to electric light plants and such as that." (Transcript of Record, p. 34.)

Appellant and his co-defendant introduced in evidence a certified copy of the application for permit to do business in the State of Texas of appellee, Crane Company, upon which its present permit was granted, in which application it was stated that the permit which appellee then desired "is for the business of manufacturing business, such as the manufacture of all kinds of steam, gas, water, oil, mine, mill, factory, engineers, railroad, hardware and builders' supplies and material, and agricultural machinery and supplies, and the purchase and sale of such goods, wares and merchandise used for such business, which said business it is permitted to do in the State of Illinois, being the State where it is incorporated, under the laws of said State, and which business it is now actually engaged in in said State." (Transcript of Record, p. 35.)

Appellant and his co-defendant also introduced in evidence the permit granted the Crane Company on the foregoing application, which authorized it to transact the business there specified within the State of Texas for a period of ten years from the date thereof.

The appellant and his co-defendant next introduced in evidence a copy of petition filed in the district court of Limestone county, Texas, in cause No. ....., State of Texas vs. Crane Company, which shows that the action was brought by the State as plaintiff, represented by B. F. Looney, her Attorney General, in which Crane Company was charged with violating the anti-trust laws of the State.

In this petition it was alleged in paragraph 1 thereof that Crane Company was doing business in the State of Texas by virtue of a permit granted it by the State on the 16th day of January, 1905. (Transcript of Record, p. 37.)

In paragraph 2 of the petition it was alleged that Crane Company from the date its permit was granted has been engaged in the business of selling within the State of Texas the various articles which it is authorized to sell by the permit (naming them) (Transcript of Record, p. 37), and that since said date it has continuously maintained a large establishment in the city of Dallas, from which place it has furnished and supplied and con-

tinues to furnish and supply its customers throughout the State. (Transcript of Record, p. 38.)

Appellant and his co-defendant also offered in evidence a copy of the answer filed by Crane Company to the petition filed by the State of Texas against it in the district court of Limestone county, Texas. (Transcript of Record, p. 46.) In this answer Crane Company in paragraph 1 of the answer proper admitted that the allegations and facts stated in paragraph 1 of plaintiff's petition were true. (Transcript of Record, p. 51.)

Among other facts stated in paragraph 1 of the plaintiff's petition were that Crane Company was doing business in the State of Texas by virtue of a permit granted it by the State on the 16th day of January, 1905. (Transcript of Record, p. 37.)

In paragraph 2 of the answer proper, as introduced in evidence, Crane Company admitted the allegations and facts stated in paragraph 2 of plaintiff's petition heretofore referred to. (Transcript of Record, p. 51.)

The facts stated in paragraph 2 of the plaintiff's petition referred to are shown above and show in substance that Crane Company from the date of its permit had been engaged in the business of selling within the State of Texas various classes of goods which it was authorized to sell by its permit. (Transcript of Record, p. 37.)

In paragraph 3 of its answer proper Crane Company admitted the facts stated in paragraph 3 of the plaintiff's petition heretofore referred to, to the extent that said paragraph alleged that Crane Company since the date of its permit has continuously maintained a large establishment in the city of Dallas, from which place it furnished and supplied its customers throughout the State. (Transcript of Record, p. 38.)

Under appellant's first eight specifications of error which, in fact, complain of the same fundamental error, we assert first the following:

FIRST PROPOSITION OF LAW.

A foreign corporation although engaged in interstate commerce cannot go into another State and there transact business purely local in its nature without securing from the latter State its permission; and such State may impose upon the foreign corporation as a condition precedent to its right to do local business any conditions that it see fit or may deem expedient; may make the

grant or privilege depend upon a permit fee and franchise tax, the amount of which shall be governed by the amount of the capital stock of the corporation; provided, however, that the corporation is within itself not an instrument of interstate commerce; and this is the rule although the transaction of intrastate business might not exceed one-fourth of its aggregate business and although the same might be a source of profit and convenience to it and in that way an aid to its interstate business.

AUTHORITIES.

Baltic Mining Co. vs. Massachusetts, 231 U. S., 68.
Horn Silver Mining Co. vs. New York, 143 U. S., 305.
Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181.
New York State vs. Roberts, 171 U. S., 658.
Paul vs. Virginia, 8 Wallace, 168.
Bank of Augusta vs. Earle, 13 Peters (U. S.), 519.
Pullman Co. vs. Adams, 189 U. S., 419.
Osborne vs. Florida, 164 U. S., 650.
Beal on Foreign Corporations, Sections 752, 753 and 754.

STATE AUTHORITIES.

People vs. Roberts, 55 N. Y. Supp., 951.
Parke, Davis & Co. vs. Roberts, 98 N. Y., 158.
Moline Plow Co. vs. Wilkinson, 105 Mich., 58.

In discussing these authorities, we desire first to dispose of the question as to the construction and interpretation which the courts of the State of Texas have put on the statutes involved here.

CONSTRUCTION OF THE REVISED STATUTES OF TEXAS BY THE TEXAS COURTS.

The right of a foreign corporation to come into the State of Texas for the purpose of transacting interstate business without first obtaining a permit or paying a franchise tax is unquestioned and it may do this as fully and as completely as if the statutes complained of by the appellee were not in existence, even to the extent of sending its solicitors into the State and soliciting business.

Alden vs. Jones Buggy Co., 91 Texas, 22.

Miller vs. Goodman, 91 Texas, 41.

Ry. Co. vs. Davis, 93 Texas, 389 (378).

Irwin vs. Nemore Powder Co., 156 S. W., 1102 (1097).

Gaar-Scott & Co. vs. Shannon, Secretary of State, 115 S. W., 364 (361).

Gaar-Scott Co. vs. Shannon, 223 U. S., 468.

The Gaar-Scott case, just cited, involved a construction of the franchise tax statute at issue in this case. It was a suit brought against Shannon, the Secretary of State of the State of Texas, by Gaar-Scott & Co., a foreign corporation, for the recovery of franchise taxes paid for the years 1905 and 1906. In that case Gaar-Scott & Co., as plaintiffs, alleged that they only transacted an interstate business within the State of Texas in the sale of their manufactured products. They claimed that they had paid the franchise tax under duress and coercion. The State's general demurrer to the petition of Gaar-Scott & Co. was sustained. The case was appealed to the Court of Civil Appeals, in which court the judgment of the trial court was affirmed. Finally the case reached the Supreme Court of the United States. The Supreme Court of the United States, in passing upon the question held that Gaar-Scott & Co., under its pleadings, conducted only an interstate business, and, therefore, did not come in any sense within the purview of the statute here under consideration, saying:

> "The plaintiff alleged that it was engaged only in interstate commerce. If so, the statute did not require from it the payment of the tax. For the Supreme Court of Texas, in Allen vs. Tyson-Jones Buggy Co., 91 Texas, 22, and Miller vs. Goodman, 91 Texas, 41, had held that the franchise tax act had no application to corporations doing an interstate business." Gaar-Scott Co. vs. Shannon, 223 U. S., 472.

We take it, therefore, as settled that it cannot be contended that the appellee in this action would be coerced into paying the franchise tax and permit fee referred to in order that it might continue to transact its interstate business.

It may be said, therefore, that if the purpose of the appellee in this case is to transact purely an interstate business, the taxation laws of this State and payment of a permit fee have no

application nor relation to it, and it cannot be deprived of any right by any alleged vice in these laws.

On the Proposition Submitted.

We desire to keep in mind in considering the authorities cited and in considering the facts of this case that the appellee here is an ordinary trading corporation, and not a corporation such as a railroad company or telegraph company, whose very business it within itself the operation of *instruments of interstate commerce*, because the rule of law applicable to these two classes of corporations is entirely different, the difference in the law being predicated upon the difference in the character of business of each class of corporations. An ordinary trading corporation enters a State for the purpose of doing intrastate or local business purely upon its own volition, and when it denies itself the privilege of doing this local business, the rights and privilege of no one are affected, except the rights and privilege of the corporation itself; while, on the other hand, a corporation whose business is within itself the operation of instruments of interstate commerce, such as railroad and telegraph companies, is of the nature of a quasi-public corporation, and it cannot forego the privilege of engaging in intrastate or domestic traffic; and any refusal on its part to so engage would meet with actions severer in their nature than that resulting from a failure to pay the tax prescribed in this act; therefore, the courts have perhaps correctly held that such corporations cannot be required to pay a franchise tax measured by their entire capital stock, as such a tax would be a burden upon interstate commerce, because the burden falls upon the instrument of commerce itself, and thus indirectly affects every citizen who has occasion to use these instruments of interstate commerce; but not so with reference to the ordinary trading corporation,—such corporation is not an instrument of interstate commerce. It is true such a corporation deals in things or property which may or may not become interstate commerce, depending solely on the will of the corporation; therefore, a burden placed upon such a corporation does not in any respect become a burden upon interstate commerce.

The conclusion of the trial judges to the effect that the intrastate business of appellee was a mere incident of its interstate business and therefore as such within the protection of the com-

merce clause of the Constitution of the United States as interstate commerce itself would not appear to be sustained by the facts as developed on the trial, and as a proposition of law is contrary to the holdings of the Supreme Court of the United States in the case of Osborne vs. Florida, supra, where that court said:

"It has never been held that when the business of the company which is wholly within the State is but a mere incident to its interstate business such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local."

Osborne vs. Florida, 164 U. S., 655.

Baltic Mining Co. vs. Mass., 231 U. S., 68.

White Dental Mfg. Co. vs. Mass., 231 *U. S.*, 68.

These cases were considered by the Supreme Court together, and involved the validity under the equal protection clause of the Federal Constitution, of an Act of the Commonwealth of Massachusetts imposing a tax on foreign corporations.

The Baltic Mining Company was a Michigan corporation with an authorized capital stock of $2,500,000. It owned a copper mine with equipment in Michigan and had its principal place of business in that State; in the city of Boston it had an office for the use of its president and treasurer who resided there, for the general financial management and direction of its business, for the meetings of its board of directors and the transfer of its stock. The company was admitted to do business in Massachusetts and complied with the foreign corporation laws of that State. Its property and assets amounted in the aggregate to $10,776,000, but none of its property was located in Massachusetts except current bank deposits, and a certificate for $80,000 of stock in another Michigan corporation. The United Metals Selling Company, a New Jersey corporation with its principal offices in New York City, but with no office in Massachusetts, had the exclusive agency for marketing the Baltic Mining Company's copper, the latter company making no sales directly itself. Considerable quantities of copper were sold for delivery in Massachusetts as well as in other States and transported from the Michigan smelter to the purchaser. In exceptional instances sales were made in Massachusetts for delivery there, but this was out of the usual course of business, amounting to not more than 5 per cent of

the total sales, the larger portion of the sales being regularly consummated in New York City. The suit was brought to recover an excise tax of $500 assessed by the Commonwealth of Massachusetts, and the action was dismissed by the Supreme Judicial Court of Massachusetts.

The S. S. White Dental Mfg. Co. was a Pennsylvania corporation engaged in the manufacturing and buying and selling artificial teeth and dental supplies with an authorized capital stock of one million dollars and with its principal office in Philadelphia, its assets aggregating $5,711,718.29. It had a place of business in Boston, consisting of large sales rooms, stock rooms and office and store rooms, occupied under lease, where it kept a supply of goods exposed for sale and in stock. Books were kept in Boston, its New England sales agent was there in charge, with fifty-four persons employed, twelve of whom were traveling salesmen, who traveled throughout the New England States, but no manufacturing was done in Massachusetts. It sold goods over the counter from its Boston store and also for delivery in Massachusetts by messenger, mail and express: 50 per cent of the sales made at their store to persons residing in Massachusetts and 50 per cent for delivery to persons residing outside of the State. Goods from the Boston stock for delivery other than over the counter or by mail or messenger were billed from the Boston sales rooms directly to the purchaser, as consignee, from the company, as consignor. Orders were accepted at the Boston sales rooms for delivery from New York and Pennsylvania, such orders being sent to the principal office in Pennsylvania and filled either in New York or Pennsylvania, and the goods billed directly from these points to the purchaser. Except in intrastate deliveries by messenger the company used public carriers in the transportation of goods, and a large percentage of the total sales required transportation from the New York or Pennsylvania factories into other States. The stock on hand in the Boston store, its fixtures and current banking deposits amounted in value to about $100,000. The company maintained fourteen places of business other than the ones in Pennsylvania and Massachusetts, which were located in New York and other States. Ten per cent of the sales were made in Massachusetts, of which approximately one-half were for delivery in other States. This company complied with the foreign corporation laws of the State and brought the action to recover an excise tax of $200 levied pursuant to the statute and

paid by it. The Supreme Court of Massachusetts held the Act valid and dismissed the petition.

Section 56 of the Massachusetts Act provided in substance that every foreign corporation shall in each year at the time of filing its annual certificate pay to the State an excise tax to be assessed by the Tax Commissioner of one-fiftieth of one per cent of the par value of its authorized capital stock, but provided further that the amount of such tax should not in any one year exceed the sum of $2000.

Section 58 of the Act provided further for notice to foreign corporations which failed to file their certificates, forfeiture and collection of penalties, issuance of injunctions, etc. The objections made to this tax were, first, that it was a regulation of interstate commerce, in that it imposed a direct burden upon that portion of the business and capital of these two companies which is devoted to interstate commerce; and, second, that the tax was in violation of the due process of law clause of the Federal Constitution, because it attempted to impose taxes upon property beyond the jurisdiction of the Commonwealth of Massachusetts; and, third, because the tax denied to those companies the equal protection of the law.

Baltic Mining Co. vs. Mass., 231 U. S., 78-82.

We restated the facts of these two cases as a matter of convenience to the court and for the purpose of directing attention to the evident fact that the business of these two corporations is analogous to the business of Crane Company, the appellee in this suit.

Crane Company maintained at Dallas, Texas, and Texas City large store rooms and wholesale and retail mercantile establishments where goods of its own and other manufacture were kept displayed for sale, in both inter and intrastate commerce, and which were largely sold within the State of Texas, something over $600,000 worth of goods being sold in Texas and shipped from these two houses during the year 1913 (Transcript of Record, p. 33), and of this amount $163,000 and a little over was in broken packages. (Transcript of Record, p. 33.) Appellee sold its goods at its Dallas house in both the retail and wholesale trade and directly over the counter in the building in which it kept the same displayed. (Transcript of Record, pp. 32 to 34.) The company did an open account business in

Dallas right over the counter and sold to plumbers and users of steam goods. A part of their line they sold direct to the retail trade, selling sewer pipe and other merchandise to anybody inside of Dallas who asked for it. It solicited this class of business throughout the State. (Transcript of Record, p. 34.)

In the Baltic Mining Company case here under discussion the statement made in the opinion shows that the Baltic Mining Company sold its products throughout the Union through the United Metals Selling Company, a New Jersey corporation, and that it sold considerable quantities of the copper for delivery in Massachusetts, as well as in other States. The fact that these sales were consummated through the medium of an agency did not make them any less interstate commerce. On the contrary, the sale of goods through a factor or agent in one State or a corporation domiciled in another State, and the shipment of such goods for such purpose, has been held to be interstate commerce, as is manifestly correct under the general rules of agency.

Butler Bros. Shoe Co. vs. U. S. Rubber Co., 156 Fed., 1.

The S. S. White Dental Manufacturing Company, as shown in this statement, was likewise a corporation engaged in interstate commerce. The holding of the Massachusetts courts with reference to the Massachusetts statute involved in those cases was the same as is before our court with reference to the statutes involved in this case; that is, that the tax levied by these statutes is not a property tax, but a mere franchise tax.

Gaar-Scott & Co. vs. Shannon, 115 S. W., 361.

Likewise, as heretofore suggested, it has been held by the Texas courts that the permit fee laws and franchise laws do not apply to corporations engaged wholly in interstate commerce. Thus far the holdings of the Texas courts with reference to our statutes are similar to the Massachusetts courts with reference to the acts under examination in the two cases referred to.

In distinguishing the Baltic Mining Company and the Dental Manufacturing Company cases from the Kansas cases, which were relied on by appellee in the trial of this case, the Supreme Court of the United States directed attention to the fact that in the Kansas cases the business of the complaining companies *"was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of State and interstate character."*

Continuing, the Supreme Court, in the case referred to, said:

> "An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the State. In the cases at bar the business for which the companies are chartered is not of itself commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. *From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved.*" (231 U. S., 86.)

The trial court in this case in its memorandum opinion appears to misinterpret the effect of the decision of this court in the Baltic Mining Company and the White Dental Company case referred to in holding that the intrastate business of the appellee is so intimately connected with its interstate business that it cannot be abandoned without burdening interstate commerce. The facts are that the intrastate business of appellee is merely a source of additional income and revenue, and only in that way an aid to its interstate business. Ludlow, appellee's manager, testified directly on this point in response to a direct question involving this issue, put to him by appellee's counsel. The question was:

"Q. What effect would it have on the interstate portion of your business or business passing over the State line—what effect

would it have on that business if the Crane Company could not do a broken package business out of Dallas?"

This witness answered:

"The Crane Company could not do the volume of business they have done since it has been in the State with the branch house, at a profit; it would be at a loss; I say that because I am familiar with all the costs of doing business in the State and know what our gross profits are; if we didn't have business that we could ship direct from our own or other factories that we handle on a smaller margin of cost than we do that which we have in Texas City and Dallas, we could not make our expenses. If we were cut off from doing the interstate part of our business, we could not make expenses of handling our local business—not on the business we do. It is beneficial to our business to be placed where we can supply purchasers with goods in broken package for local distribution; it that was withdrawn from our general business, I don't see how we could maintain a house in the State—could not do business in the State. It would be hurtful to the interstate business to withdraw our privilege of doing a local business—selling out of broken packages. Our gross profits for the year 1913 were 20.13 per cent of our total business in Texas from the Dallas house. If we charge 5 per cent on the investment in real estate, building and fixtures, our net profit would be 5.18 per cent. The average profit for the past nine years has been—gross, 19.48; net, 4.47½ per cent."

If it is to be held that the mere fact that a foreign corporation will make fewer sales and receive less gross or net receipts by reason of the fact that it does not do or is prohibited from doing an intrastate business, and that by reason thereof its interstate commerce business is burdened, then a new doctrine has been introduced into the law; that would make it within the power of any corporation, domestic or foreign, to abrogate substantially all regulations sought to be exercised by States over corporations, for with our modern facilities of communication and transportation practically all manufacturing and mercantile corporations of any size are able to do and do engage in both inter and intrastate business. Appellee carries on a purely local and domestic business, quite separate from its interstate business, save that its intrastate business increases its receipts and sales. *Its local and domestic business, based upon the assumption that its original package business is not intrastate, is real and substantial,*

amounting to more than $163,000 per year, or one-fourth of its total Texas business, and this business, as suggested, is not so connected with interstate commerce as to render a tax upon it a burden upon interstate commerce, unless the court is prepared to go to the extent above suggested. What was evidently meant by this court in the Baltic Mining Company case, supra, and shown in the quotation above, to the effect that intrastate business might be so intimately connected with interstate business as to render a tax upon it a burden upon interstate commerce, is to be determined by considering the cases then before the court and what was in the mind of the court at the time.

The two Kansas cases referred to were then being considered by the court and being distinguished from the Baltic Mining Company and the White Dental Company cases; and these two cases involved the operation of common carriers, in which instances they could not abandon their intrastate business, so long as they maintained their characters as common carriers, and which, aside from the physical facts, was the status in the mind of the court in referring to the intimate connection between the inter and intrastate business of these corporations.

It seems to us that the validity of the Texas laws must depend upon the laws themselves, and not upon the wholly fortuitous circumstances of any particular corporation's method of transacting business. The right of a State to exclude a foreign corporation from its borders, so long as no principle of the Federal Constitution is violated, is a well established principle recognized in the decisions of this court.

Baltic Mining Company vs. Mass., 231 U. S., 68 (83).

Hammond Packing Company vs. Arkansas, 212 U. S., 322 (343).

Barron vs. Burnside, 121 U. S., 186.

The mere fact that a corporation is engaged in interstate commerce does not exempt its property from State taxation.

Baltic Mining Company vs. Mass., 231 U. S., 68 (83).

United States Express Co. vs. Minn., 223 U. S., 335 (344).

The rule is equally well established and recognized by this court that it is the commerce itself which must not be burdened by the State exactions which interfere with the exclusive Federal authority over it, and that a resort to the receipts or property employed in part in interstate commerce, when such receipts or

capital are not taxed as such but are taken as a mere measure of a tax lawfully within authority of the State has been sustained.

Baltic Mining Co. vs. Mass., 231 U. S., 68 (83).
Maine vs. Grand Trunk Ry. Co., 142 U. S., 217.
Provident Institution vs. Mass., 6 Wallace, 611.
Hamilton Co. vs. Mass., 6 Wallace, 632.
Flint vs. Stone-Tracy Co., 220 U. S., 107.

Under the rules laid down in these authorities and the desision in the Baltic Mining Company case we are at a loss to know how it may be reasonably concluded that the permit fee and franchise tax laws of this State may be said to impose a burden upon interstate commerce. They certainly do not apply to corporations whose business is interstate commerce, nor to corporations exclusively in interstate commerce. A corporation engaged in interstate commerce would of necessity have the right to do incidentally any of those things within intrastate commerce which were necessarily incident to the proper exercise of its right to transact interstate commerce, but we think it can hardly be contended with reason that the right to sell one-fourth of its merchandise amounting to more than $160,000 per year, at wholesale and retail, in broken packages, can be said to be a necessary aid or incident to the interstate commerce of appellee. It is, of course, a convenience and a source of profit, but no more so than would be a lesser or greater amount of sales. The mere desire of appellee to do an intrastate business to the extent of one-fourth of its total Texas business and the revenue derived therefrom arises out of the business desire of the corporation and not of the necessities of interstate commerce.

Horn Silver Mining Co. vs. New York, 143 *U. S.*, 305, *et seq.:*

The Horn Silver Mining Company was a corporation created under the laws of the Territory of Utah. The suit was brought by the people of the State of New York upon the allegation that this company was doing business within the State in 1881 and 1882, the purpose of the suit being to recover certain taxes alleged to be chargeable on its corporate franchises or business for those years and the penalty prescribed for their non-payment in each year. By an Act of the Legislature of New York, approved May 26, 1881, amending a previous Act, providing for levying taxes for the use of the State upon certain corporations, joint stock companies and associations, it was declared that every cor-

poration, joint stock company or association then or thereafter incorporated or organized under any law of the State, or of any other State or country, and doing business in the State, with certain specified exceptions not important here, should be subject to a tax upon its corporate franchise or business, to be computed in a mode specified, *which was by a certain percentage upon its capital stock, etc.* The complaint in the action alleged the facts necessary to charge the corporation under this Act of the Legislature for both years and that the amount of tax due for the year ending on the first day of November, 1881, was $7500, and the additional sum of $1500 as a penalty for the delay of the company in paying the tax; that the amount of tax due for the year ending the first day of November, 1882, was $30,000, with the further sum of $3000 as a penalty. The defendant, Horn Silver Mining Company, answered the State's complaint, denying the charge of liability to the people of New York and setting up substantially that it had been at all times a manufacturing corporation organized and existing under the laws of Utah; that it had never exercised any franchises or powers under the laws of New York; that its capital stock of $10,000,000 was issued in payment of real estate in Utah and Illinois, which consisted entirely of mining property and improvements thereon and a refinery; that during the years ending November 1, 1881, and 1882, it carried on in the State of New York the business of manufacturing bars of silver from Utah and Illinois into standard bars; that said business constituted but a small portion of its entire business and was the only business carried on in the State of New York, except its financial business and correspondence; that its capital stock was only partially employed in New York and that it paid taxes both in Utah and Illinois. It then pleaded the identical provisions of the Federal Constitution that are invoked here, claiming, among other things, that the imposition of a franchise tax determined by a percentage against its capital stock was an interference with interstate commerce. The Supreme Court of the United States held that the corporation was subject to the franchise tax imposed and that the manner and extent of levying the tax was not in violation of the Constitution of the United States.

In discussing the issued involved, in arriving at the conclusion that the tax was not in violation of the Constitution of the United States, Mr. Justice Field of the Supreme Court of the

United States, who wrote the opinion of the court, among other things, said:

> "It is true, the greater part of the business of the company was done out of the State, and the greater part of its capital was also without it, but the statute of New York does not require that the whole business of a foreign corporation shall be done within the State in order to subject it to the taxing power of the State. It makes, in that respect, no difference between home corporations and foreign corporations, as to the franchise or business of the corporation upon which the tax is levied, provided it does business within the State, as such corporation.
>
> "There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the State. That is a matter, however, resting entirely in the control of the State, and not a matter of Federal law, and with which, of course, this court can in no way interfere."

Continuing further the opinion reads:

> "The extent of the tax is a matter purely of State regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce, we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the State and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company."

Pembina Mining & Milling Co. vs. Pennsylvania, 125 *U. S.*, 181, *et seq.:*

In May, 1881, the Pembina Consolidated Silver Mining & Milling Company was incorporated under the laws of Colorado, with an authorized capital stock of $1,000,000, for the purpose of carrying on a general mining and milling business in that State. Its principal office was in Alpine, Colorado, and after July 1, 1881, it had also, and at the time of the institution of the suit, an office in the city of Philadelphia for the use of its

officers, stockholders, agents and employes. On the 31st day of October, 1881, the proper authorities of the State of Pennsylvania assessed against the corporation for "office license," from July 1, 1881, to July 1, 1882, a tax at the rate of one-fourth of a mill on each dollar of its capital stock, which amounted to $250, and added to it a penalty of $125 for failure to take out the license. This tax was assessed and penalty imposed under an Act of the Legislature of the State of Pennsylvania.

A suit arose out of the foregoing facts and in due course of time reached the Supreme Court of the United States. It was there urged that the tax law referred to authorizing the assessment of the tax based upon the total capital stock of the corporation was in violation of the Federal Constitution, which vested in Congress the power to regulate interstate commerce and which declares that citizens of each State are entitled to the privileges and immunities of citizens of the several States, and that no State should deny to any person within its jurisdiction the equal protection of the laws. The court sustained the statute in question, against each of these assaults made against it. In passing upon the question, the Supreme Court of the United States said:

> "1. It is not perceived in what way the statute impinges upon the commerce clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents or employes. The tax is not for their office, but for the office of the corporation, and the use to which it is put is presumably for the latter's business and interest. For no other purpose can it be supposed that the office would be hired by the corporation.
>
> "The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied. In Paul vs. Virginia, 8 Wall., 168, this court,

speaking of a foreign corporation (and under that definition the plaintiff in error, being created under the laws of Colorado, is to be regarded), said: 'The recognition of its existence, even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States,—a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion."

Statutes similar to our own have been sustained by the domestic courts of various States, the opinions of which are cited above, which opinions have been uniformly sustained by the Supreme Court of the United States.

As we have heretofore suggested, there is a physical, as well as a legal, difference between an ordinary trading corporation's business and the business of a public service corporation engaged in operating an instrumentality of interstate commerce. It is firmly established by the decisions of the Supreme Court of the United States that the ordinary trading or commercial corporation may be taxed for the privilege of doing a domestic business in a State, though part of its business consists of the sale of goods brought from another State.

Mr. Beale, in his very able work on Foreign Corporations, recognizes and clearly points out this difference. He says:

"There is probably a difference in this respect between an ordinary commercial business and the business of a public service company, which is directly engaged in interstate commerce. The ordinary commercial corporation may be taxed for the privilege of doing business, even though part of its business consists of the sale of goods brought from another State; provided, that part of its business is or may

be the sale of domestic goods, but it seems that where an express company or a railroad company is engaged in interstate commerce it is difficult, if not impossible, to impose conditions on its business within the State which will not affect its interstate business. The Supreme Court of the United States has pointed out the distinction between corporations organized to carry on interstate commerce and having a quasi-public character and corporations organized to conduct strictly private business. This distinction has been emphasized in other cases." Beale on Foreign Corporations, Section 754, citing L. M. R. R. Co. vs. Eubank, 184 U. S., 27; N. Y. vs. Roberts, 171 U. S., 658; People vs. Roberts, 55 N. Y., 950.

The Supreme Court of the United States has more than once pointed out the distinction between corporations organized to carry on interstate commerce and having a quasi-public character and corporations organized to conduct strictly private business. On this point Mr. Justice Shiras, on delivering the opinion of the Supreme Court of the United States, in the case of New York vs. Roberts, 171 U. S., 664, said:

"When a corporation of one State, whose business is that of a common carrier, transacts part of that business in other States, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective States infringe upon the freedom of interstate commerce. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different States, and the subject has been much discussed in several recent cases. Western Union Telegraph Co. vs. Mass., 125 U. S., 530; Pittsburg, Cincinnati, etc., Ry. vs. Backus, 154 U. S., 41; Pullman Palace Car Co. vs. Pennsylvania, 141 U. S., 18; Adams Express Co. vs. Ohio, 165 U. S., 194. It is not necessary in this case to enter into a subject so difficult but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business."

The court further held that the corporation concerned in that case, which was a trading corporation, *which stored and sold goods in original packages*, very similar in its business to the business of the present company, came within the doctrine of Horn Silver Mining Company vs. New York, 143 U. S., 305, which latter case the court reaffirmed as stating the law correctly.

THE CASES RELIED ON BY (DEFENDANT) APPELLEE.

The cases relied on by (defendant) appellee in the trial court and which appear in its briefs and arguments filed therein are as follows:

Western Union Tel. Co. vs. Kansas, 216 U. S., 1.
Pullman Co. vs. Kansas, 216 U. S., 56.
Ludwig vs. Western Union Tel. Co., 216 U. S., 146.
Western Union Tel. Co. vs. Andrews, 216 U. S., 165.
Southern Ry. Co. vs. Greene, 216 U. S., 400.
International Text Book Co. vs. Pigg, 217 U. S., 91.
A., T. & S. F. Ry. Co. vs. O'Connor, 223 U. S., 280.
Meyer vs. Wells Fargo & Co., 223 U. S., 298.
Buck Stove Co. vs. Bickers, 226 U. S., 205.
Williams vs. City of Talladega, 226 U. S., 404.
Adams Express Co. vs. New York, 232 U. S., 14.
Platt vs. City of New York, 232 U. S., 35.

These cases fall into two classes; those in which the corporations involved were engaged in exclusively interstate commerce, and those which were operating instrumentalities of interstate commerce, or, as might be said, were themselves instruments of interstate commerce.

Both the Kansas cases and the cases of Ludwig vs. Western Union, and Western Union Telegraph Co. vs. Andrews, all four of which are reported in 216 U. S., were cases where the statute was made to apply broadly to both interstate and intrastate commerce and where the corporations themselves were actually operating instruments of interstate commerce.

In the Western Union Telegraph Company vs. Kansas case the opinion of the court states:

> "The authorities cited show that this court has guarded with both diligence and firmness the freedom of commerce

against hostile State or local action, as such action has been manifested by regulations operating in some instances directly and others indirectly upon the *means* or *instrument* employed in that commerce." (216 U. S., 26.)

The whole opinion is based upon that proposition. The opinion also very clearly recognizes the physical and legal distinction existing between ordinary trading corporation such as appellee in this case and telegraph and railroad companies which are engaged in operating actual *instruments* of interstate commerce. For the opinion further on states:

"It is true that in many cases the general rule has been laid down that a State may, if it chooses to do so exclude foreign corporations from its limits or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people, but those were cases in which the particular foreign corporation before the court was engaged in *ordinary business* and not directly or regularly in interstate or foreign commerce." (216 U. S., 33.)

The cases to which the court in the sentence above quoted manifestly refers to are those cases cited by us in support of our proposition under consideration. The cases cited by us were cases of ordinary trading corporations engaged in business more or less similar to the business of the appellee, and, as suggested the court very clearly recognizes a distinction between corporations of the character here under consideration and those engaged in operating actual instruments of interstate commerce.

The case of Pensacola Tel. Co. vs. Western Union Tel. Co. 96 U. S., 1, et seq., is the first case which announced the principle contended for by appellee, and in that case the matter under consideration was the attempt of the State of Florida to regulate a telegraph company whose business was the operation of an actual instrument of interstate commerce; and in considering the question it is well enough to go back to this case, because, as we take it, this court has not intended to go further than the doctrine announced in that case; otherwise, it would not have decided the cases cited by us, which are all later than the Florida case, as it did decide them; that is, they are all later than the Florida case except the case of the Bank of Augusta vs

Earle, and Paul vs. Virginia. The language used by Chief Justice Waite in the opinion in the Florida case, above referred to, shows that he had in mind burdens imposed on actual instruments of commerce. Note the following language from the opinion, referring to the power of Congress to regulate commerce among the States:

> "*The powers thus granted are not confined to the instrumentalities of commerce* or the postal service *known or in use when the Constitution was adopted,* but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstance. They extend from the horse with its rider to the stage coach; from the sailing vessel to the steamboat; from the coach and steamboat to the railroad and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of the increasing population and wealth." (96 U. S., 9.)

It will be recalled that in the two Kansas cases referred to Mr. Justice Holmes wrote a dissenting opinion, in which he was joined by the Chief Justice, Mr. Justice McKenna and Mr. Justice Peckham. It is thus seen that the principle announced, even with reference to instruments of interstate commerce, was announced by a seriously divided court. It is all true that Mr. Justice Holmes afterwards wrote the opinion in the case of A., T. & S. F. Ry. Co. vs. O'Connor (223 U. S., 404), but there is nothing in this opinion to indicate that he had changed his original views as announced in his two dissenting opinions. In fact, his language in the opinion in the O'Connor case is rather significant of the fact that he still entertained an attitude of dissent toward the opinion of the majority of the court, which is so apparent in his opinion in the case of Western Union Tel. Co. vs. Kansas, 216 U. S., 52, for note his language in the O'Connor case:

> "Therefore, it is obvious that the tax *is of the kind decided by this court to be unconstitutional.*" (223 U. S., 285.)

Certainly this language, as well as the entire opinion, contains no indication that Mr. Justice Holmes had changed his opinion relative to the merits of the law question involved in the

O'Connor case as well as in those cases in which he wrote dissenting opinions.

In the case of Adams Express Co. vs. New York, 232 U. S., 14, the ordinance of the city of New York, under examination, was made to apply to both interstate and intrastate commerce, and the court merely held that it was void because it could not be made to apply alone to interstate business, saying:

> "We conclude that the complainant was entitled to an injunction restraining the enforcement of the ordinances in question against the company with respect to the conduct of its interstate business and its wagons and drivers employed in interstate commerce." (232 U. S., 34.)

This opinion was reiterated in the Platt case immediately following the Adams case, on page 35 of the 232d U. S. It will also be noted in this case that the Adams Express Company was engaged in interstate commerce; that is to say, *was an instrument of interstate commerce.*

The case of Myer vs. Wells Fargo & Co., 223 U. S., 298, is the same character of case, because the tax complained of was levied against a corporation which itself *was an instrument of interstate commerce.*

The Talladega case (226 U. S., 404) involved the rights of a telegraph company, *which was not only an instrument of interstate commerce, but was an agency of the Federal government as well.*

The cases of Buck Stove Company vs. Bickers (226 U. S., 205), and International Text-Book Co. vs. Pigg (217 U. S., 91), cited by appellee, are cases where the corporations *were engaged exclusively in interstate commerce and not doing any local or intrastate business.* So that it will be found, upon examination, that none of these cases relied upon by appellee in the trial court are in point against the contentions here made by appellant.

We submit an additional proposition under our first eight assignments of error, as follows:

SECOND PROPOSITION OF LAW.

Inasmuch as the evidence in this case showed that the original packages of goods sold by appellee at its Texas storehouses

were shipped to and received by it as the consignee and not for any particular or specific person, but for sale generally, either in original or broken packages at wholesale or retail, and inasmuch as these original packages when received by appellee as consignee were placed by it in its storerooms at Dallas and in Texas City and exposed for sale on its shelves, along with large quantities of goods in broken packages, for the purpose of and with the intent to sell the goods thus exposed for sale in original packages either in original packages or broken packages and at wholesale or retail, as the demands of the trade might require, said goods in original packages were so acted upon by appellee that they became incorporated and mixed up with the mass of the property of the State at their final destination and were no longer interstate commerce, but were intrastate commerce; and when taken in consideration with and in connection with approximately one-fourth of said goods which were sold in broken packages, made and constituted appellee's business within the State of Texas one principally of intrastate commerce, and the court erred, as shown in the assignments of error under which this proposition is stated, in holding unconstitutional and void the statutes under consideration, and in granting the injunction.

Authorities and Remarks on This Proposition.

The rules which will now be stated appear to be elementary ones, sustained by well considered authorities.

When Protection of Commerce Clause Attaches.

Whenever property has lawfully begun to move upon its final journey as an article of commerce from one State to another, that moment it becomes the subject of interstate commerce, and as such is subject only to national legislation.

Gillman vs. Philadelphia, 3 Wall. (U. S.), 724.

Coe vs. Errol, 116 U. S., 517.

But this movement does not begin until the articles have been shipped or started for transportation from one State to another, mere preparing of the article for transportation being insufficient.

Coe vs. Errol, 116 U. S., 517.

U. S. vs. Bowyer, 85 Fed., 425.

In the Coe case just cited this court held that whenever prod-

ucts of the farm or forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there. (116 U. S., 517.)

When Protection of Commerce Clause Ceases.

The point of time when an article of interstate commerce ceases to be such and the power of the State over it begins is not the instant when the article enters the State, but when the importer has so acted upon it that it becomes incorporated and mixed up with the mass of the property in the State.

Gibbons vs. Ogden, 9 Wheat. (U. S.), 1.
Brown vs. Maryland, 12 Wheat. (U. S.), 419.
Welton vs. Mo., 91 U. S., 275.
Howe Machine Co. vs. Gage, 100 U. S., 676.
Tiernan vs. Rinker, 102 U. S., 123.
Brown vs. Houston, 114 U. S., 622.
Robbins vs. Shelby County Taxing Dist., 120 U. S., 489.
Leisy vs. Hardin, 135 U. S., 100.
Emert vs. Missouri, 156 U. S., 296.

When Incorporation in Intrastate Commerce Takes Place.

Various acts have been held to amount to an incorporation or transformation of goods from interstate commerce into intrastate commerce. For example, when goods are delivered to the consignee in certain instances. (Authorities, supra.) After the articles have left the hands of the importer they are no longer subjects of interstate commerce.

Kidd vs. Pierson, 128 U. S., 23.

It is conclusively held also that the first sale in the State of the imported article destroys its character as an import, and incorporates it within the mass of the property of the State.

Welton vs. Missouri, 91 U. S., 275.
Leisy vs. Hardin, 135 U. S., 100.

It has been said that it is only by the sale of the imported article that it becomes mingled with the other property of the State.

In re Minor, 69 Federal, 233.

But, says a leading text on the subject:

> *"The better rule seems to be that when the goods have come to rest at their final destination and are exposed for sale or use they become a part of the mass of the property of the State, even though they remain in original packages."*

17th Am. and Eng. Ency. of Law, p. 71.
(Article on Interstate Commerce by Wm. B. Hale.)

The writer in support of this proposition cites authorities as follows:

Brown vs. Houston, 114 U. S., 622.
Robbins vs. Shelby County Taxing District, 120 U. S., 497.
In re May, 82 Fed., 422.
American Harrow Company vs. Shaffer, 68 Fed., 750.
Price Co. vs. Atlanta, 105 Ga., 365.
State vs. Intoxicating Liquors, 65 Maine, 556.

It seems to us that the rationale of the rule is that regardless of the condition and circumstances of the imported goods and regardless of whether they are in broken or unbroken packages they cease to be interstate commerce when they come to rest at their final destination, are exposed for sale along with other property which is in intrastate commerce and become a part of the mass of the property of the State. In other words, as to whether goods are interstate commerce or intrastate commerce is largely a question of fact, and does not depend wholly upon the status of the goods as to whether they were in original or broken packages. This statement of the rule would appear to be sound in reason, as well as supported by authority.

In the case of Brown vs. Houston, 114 U. S., 622, it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania becomes intermingled on arrival there with the general property of the State of Louisiana and is subject to taxation

under the laws of that State, although it may be after arriva sold from the vessel on which the transportation was made an without being landed and for the purpose of being taken out o the country on a vessel bound to a foreign port. In this case th coal when the assessment was made was afloat on the Mississipp river in the original condition in which it was shipped fro Pennsylvania. This court, holding that the coal was subject t taxation, among other things, said:

> "It (meaning the tax) was imposed after the coal ha arrived at its destination and was put up for sale. The coa had come to its place of rest, for final disposal or use, an was a commodity in the market of New Orleans. It migh continue in that condition for a year or two years, or onl for a day. It had become a part of the general mass o property in the State."

Brown vs. Houston, 114 U. S., 622 (622-623).

The logical basis for the holding in this case (Brown vs. Hou ton) is that inasmuch as the coal had arrived in the conditio in which it was to be and was offered for sale in intrastate com merce, it therefore at once entered into and became a part o such commerce. No breaking of the package or change in it status was contemplated nor necessary in order to prepare it fo the intrastate market. In this respect, many of the articl handled by appellee occupy a position and status analogous t the coal shipment. Appellee deals in heavy hardware, such a bath tubs, for example, which come each bath tub crated sepa rately and which is intended to be offered for sale and is so offere in the original crate in intrastate trade.

To this instance the rule that the package must be broken b fore the articles enter intrastate commerce does not apply, for th reason that there is no package to be broken in order to prepa it for such intrastate commerce. The reason of the original pac age rule has no foundation here and when the reason of the ru ceases to apply the rule itself has no application. The "breal ing" of the "original package" is an evidence merely that th package has reached its destination and has entered intrasta commerce, but if there is no necessity for this breaking; in oth words, if the package is a single article and has come to rest a its destination in a condition to be placed in intrastate com

merce and has actually been so placed for sale in intrastate commerce, then like the coal in the Brown vs. Houston case, supra, the article is *in* intrastate commerce, and subject to our laws, though not removed from the crate in which such single article was shipped.

This rule and analogy may be applied to other articles handled by appellee, such as pipe and other heavy and bulky hardware, but these applications of the rule would readily suggest themselves without a continuation of this immediate discussion.

In the case of the State vs. Intoxicating Liquors, 65 Maine, 556, the action was a libel under the search and seizure statute of the State and the controversy was about four cases of imported whisky. It was admitted by the State that at the time of the seizure these casks were in the original packages, unbroken as imported, were lawfully imported by the claimant and were then in his possession as his property and had never been sold by him. The claimant contended that under these facts the liquors were by law not liable to forfeiture whether he then had in mind to sell the same in any way in the State of Maine in violation of law or not. The question at issue as stated by the court was whether or not imported liquors were liable to seizure and forfeiture when the importer retains possession of them in the original package, but for the purpose of and with the intent to break it and sell them in the State in quantities less than a package. The court answered this question in the affirmative, but recognized the original package rule as pronounced by this court, but held that when by any act of the importer the thing imported has become a component part of the general mass of property in the State, as when the original package has been broken up for use or for retail, or when the commodity has passed from the importer's hands into the hands of the purchaser that it has lost its distinctive characteristic as an import and becomes subject to the laws of the State, but held that inasmuch as it was the purpose and intent of the claimant to break these original packages and sell the liquor in violation of the laws of the State that he was not protected by the original package doctrine, and the liquors were subject to seizure, saying:

> "A sale in the original package only, being authorized by the Federal statute, the breaking and selling in a less quantity is without that authority, and is within the prohibition

> of the State law; and a fixed intent that the package shall be broken and sold must place the liquors in the same category. It would hardly be considered reasonable that the Federal law should protect property until an actual unauthorized sale was completed, when the intent to make such a sale is avowed. Such 'aid and comfort' to violators of the internal regulations of the State is not within the spirit of the regulations of foreign commerce." (65 Me., 556.)

We are aware, of course, that this State authority is only persuasive and suggestive, but we believe the rule announced to be a sound one. In the present case the entire amount of goods shipped by appellee to its Dallas and Texas City houses within the State of Texas were placed on the shelves and exposed for sale, about one-fourth of the packages being broken. The broken and unbroken packages were intermingled together on the same shelves and offered to the trade, wholesale and retail, in such quantity and form as the trade might demand.

We respectfully insist that under such circumstances the entire mass of the goods had ceased to be in interstate commerce and were in intrastate commerce. But whether this be so or not certain it is that all that portion of the goods the original packages of which were broken and which amounted to a fourth of the total sales or an aggregate of more than $163,000 were in intrastate commerce and make appellee's business an intrastate commerce business in a very substantial amount. We admit, of course, that the sale of goods in original packages merely as such when brought into the State from another State, kept, handled and sold for no other purpose, is interstate commerce as well as the completion of interstate commerce, but this was not the business of appellee. The exposure and offering for sale either in broken or original packages of goods so brought into the State as well as the actual sale of one-fourth of its goods in broken packages was the business in which appellee was engaged. It would have broken all the packages if its customers had demanded their merchandise in that form. It had commingled the goods in original packages with its goods in broken packages and exposed the commingled goods for sale at the same place, on the same shelves and sold the same through common agents and employes. It paid the taxes on these goods in original packages the same as it did its other goods (Transcript of Record, pp. 6

and 7), and rightfully so, for in such instances and under these circumstances they had lost their character of interstate commerce. The fact that all of its goods were not sold in broken packages was not due to the nature, rules and regulations of appellee's business, nor to the actual business it was engaged in, but solely to the accidents of demand. The business of appellee was not engaging in interstate commerce, but in selling goods within the State, either in broken or original packages, all stored, exposed and commingled together in such quantities and in such packages as the trade demanded. It seems to us that sound rules of reason would dictate a conclusion that appellee was engaged in intrastate commerce, and that all its goods which had thus reached their destination and ecome mingled with its other property were in intrastate commerce and that no part of the same, though a portion thereof were in original packages, was still within interstate commerce.

Under our ninth specification of errors we desire to direct attention to the following proposition of law, in support thereof, towit:

THIRD PROPOSITION OF LAW.

If it be held that the permit fee and franchise statutes of the State are constitutional and the sole question remaining being whether or not the business of appellee comes within the operation of these laws, then this action against the Attorney General in his official capacity is in effect a suit against the State, which cannot be maintained without the consent of the State and which not being given the court erred in failing to dismiss the bill.

The purpose of the suit as against the appellant, as shown in the prayer to the original bill, is in substance that B. F. Looney, as Attorney General, be restrained and enjoined from attempting in anywise to enforce against appellee the permit and franchise tax laws of the State, relating to foreign corporations, and from instituting any suit for the collection of any franchise tax or permit fee, or any suit to cancel the permit of appellee to do business in Texas, on the ground that it has failed to pay the fees required by the laws of Texas for foreign corporations to do business therein, and from instituting any suit against the appellee to enjoin it from transacting business in the State of Texas,

based on its failure to pay said permit fees or franchise taxes. (Paragraph 22 of the original bill, Transcript of Record, p. 12.)

The Attorney General of Texas is not only the general law officer of the State, with the implied powers incident to his title, but is charged by the Constitution of the State with the special duty of inquiring into the exercise of all corporate rights and privileges.

Harris' Constitution of Texas, Art. 4, Sec. 22, copied at page — of this brief.

He is likewise specially charged by statute with the enforcement of the permit fee and franchise tax laws of the State.

Vernon's Sayles' Revised Statutes of Texas, Article 7397b, Article 7404, copied at page — of this brief.

This constitutional provision and these statutes are sufficient to bring this case within the rule announced in Ex Parte Young, 209 U. S., 123, provided the permit fee and franchise tax statutes of the State are unconstitutional. But when it is once conceded that the acts here in question are valid, constitutional laws then this action against the Attorney General takes on a very different color. The ground of contention in the Ex Parte Young case, supra, and upon which in that case it was held that the action against the Attorney General was not one against the State, was because the law under which the Attorney General was authorized to act was unconstitutional, and therefore his action taken thereunder could not be in his representative and official capacity, but was of necessity a personal action and therefore the suit against him not one against the State. Nor does this suit come within the rule announced in the case of Louisville & N. R. Co. vs. Bosworth, 209 Fed., 380, and Reagan vs. Farmers Loan & Trust Company, 154 U. S., 362, where though the statutes may have been valid the actions sought to be taken by the State officers were unconstitutional and not within the statute or the law. This case reduced to its least analysis, the statutes under examination of themselves being admitted to be valid, amounts then to a suit to enjoin the Attorney General in the performance of his statutory duties, prescribed by valid and constitutional laws, and being thus against him in his official capacity acting within constitutional limits, the case becomes necessarily one against the State. In support of this conclusion, we cite the following authorities:

Fitts vs. McGhee, 172 U. S., 516.
In re Ayers, 123 U. S., 443.
Hagood vs. Southern, 117 U. S., 52.
Cunningham vs. Macon, etc., Ry. Co., 109 U. S., 446.
Eleventh Amendment to Constitution of the United States.

It being once agreed that the law is constitutional, no grounds for relief in equity are shown, for the general principle is that it is not for the courts to stop officers from performing their statutory duties for fear they should perform them wrongly.

Dalton Adding Machine Company vs. Virginia, 236 U. S., 699 (701).

First National Bank of Albuquerque vs. Albright, 208 U. S., 548 (553).

Especially is this true in the matter of collecting taxes and license fees.

Dalton Machine Co. vs. Virginia, supra.

Boise Artesian Hot. etc., Water Co. vs. Boise City, 213 U. S., 276.

Or, as said in effect by this court in Langford vs. Platte Iron Works Company, 235 U. S., 461 (475), *the court cannot assume that State officers will not faithfully administer the matters under their control.* The most that the Attorney General is charged with intending to do is of applying to the courts of the State of Texas for proper assistance in administering valid laws of the State and in doing this he necessarily acts for the State. It is elementary that every government entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other.

In re Debbs, 158 U. S., 564 (584).

As a State can only act by its officers, an order restraining those officers from taking any steps by means of judicial proceedings in the execution of a valid statute is one which restrains the State itself, and the suit is consequently as much against the State as if the State was as a party defendant on the record.

Fitts vs. McGhee, 172 U. S., 516.

Or, as was said in the case of In re Ayers, 123 U. S., 443 (497), "how else can the State be forbidden by judicial powers

to bring actions in its name except by constraining the conduct of its officers, its attorneys and its agents? And if all such officers, attorneys and agents are personally subjected to the powers of the court so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

In this case the court, in discussing further the purpose of the Eleventh Amendment to the Constitution of the United States, said that to secure the manifest purpose of this constitutional exemption it should be interpreted, not literally and too narrowly but freely and with such breadth and largeness as to effectually accomplish the substance of its purpose; that "in this it must be held to cover not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which and alone in fact the relief is asked and against which the judgment or decree effectively operates."

In re Ayers, 123 U. S., 443 (505).

In other words, in the case just quoted from the court substantially held that the mere bringing of a suit on behalf of the State by its Attorney General cannot make that officer a trespasser and individually liable to the parties suing, and that to enjoin him from representing the State in such suits is for every practical or legal purpose to enjoin the State itself.

The bill of complaint does not allege that the Attorney General was about to or intended to do anything other than those duties specified in the statutes which it is contended are unconstitutional. In other words, all that he intended to do so far as the bill charges is lawful, if the statutes under which it was alleged he would act are constitutional. Such being the state of the complaint, we respectfully submit that if these statutes are valid and constitutional, then that the suit against the Attorney General is necessarily one against the State and the bill should have been dismissed.

In the case of Dalton Adding Machine Company vs. Virginia, 236 U. S., 690, the bill alleged that the appellant was a Missouri corporation having a factory in Missouri, but that it obtained orders for its machines in Virginia through drummers, and considers, accepts or rejects them in Missouri, and where it ac-

cepted them forwarded the machine from this factory. It contended that this business was wholly interstate. A statute of Virginia required that foreign corporations doing business there obtain a license from the State Corporation Commission, pay a fee, etc., and it was alleged that this Commission threatened to take proceedings to enforce the statute and the penalties provided for disobeying it against the company, contrary to Article 1, Section 8, of the Constitution. The company likewise alleged that it had reason to fear and did fear a multiplicity of proceedings and the payment of many fines, and that it would suffer irreparable loss from even a temporary interference with its affairs. The trial judges denied the application for injunction on the ground that no case for an injunction was made out, and the Supreme Court of the United States concurred in this holding, saying:

> "The court below remarked that it was not contended that the statute was unconstitutional, but was alleged only that it was feared that it might be enforced in such a way as to contravene the commerce clause, and suggested that if proceedings should be instituted by the Commission there would be a hearing before it with a right to appeal to the Supreme Court of Appeals, and upon a proper showing to take the case to this court, and that there was nothing to indicate that the Commission would not give the appellant a fair hearing or would attempt to enforce the law against it in an oppressive way. * * * We agree with the district court in its conclusion and its grounds." (236 U. S., 700.)

If no cause of action was shown in the Dalton Machine Company case, supra, against the State's officers, how can it be said that the cause of action is here shown, provided our statutes are constitutional? And on what theory might it be contended that the action against the Attorney General is a personal one and not one against the State of Texas?

We respectfully submit that if the Texas statutes are valid and constitutional laws, then no cause of action against appellant personally is shown, but that the action is in effect one against the State without its consent, in violation of the Eleventh Amendment to the Constitution of the United States.

Based upon our several assignments of error to the action of the court in granting the injunction against Ben F. Looney, the Attorney General of the State of Texas, we submit to the court the following

FOURTH PROPOSITION OF LAW.

The permit fee and franchise statutes of this State attacked by the bill of complaint in this suit being valid and constitutional, the bill alleged no ground for equitable relief or injunction against the Attorney General, and the facts showed no ground for such relief, and the court erred in granting the temporary injunction against him.

It will be recalled that the only cause of action alleged in the bill of complaint against the Attorney General was to the effect that he would enforce the permit fee and franchise tax statutes of the State, but no allegation was made that he would attempt to do this in an oppressive matter or in any manner other than that authorized and permitted by law. Such being the allegations and facts, the case comes within the rule of some of the authorities which we have hertofore cited and discussed, but which we append at this time under this proposition.

Dalton Adding Machine Company vs. Virginia, 237 U. S., 699.

First National Bank of Albuquerque vs. Albright, 208 U. S., 548 (553).

Boise Artesian Hot, etc., Water Co. vs. Boise City, 213 U. S., 276.

The case is substantially on all fours with the Dalton Adding Machine Company case, supra, and clearly within the holding of the court in that case.

CONCLUSION.

In conclusion, we respectfully pray the court for a reversal of the judgment of the District Court of the United States for the Northern District of Texas, granting the temporary injunction against the appellant, Ben F. Looney, Attorney General of the State of Texas; that said judgment granting said injunction be

reversed, the order thereof vacated and annulled and that this case be ordered dismissed for the errors assigned.

BEN F. LOONEY,
Attorney General of the State of Texas, Appellant,
For Himself.

C. A. SWEETON AND
C. M. CURETON,
Assistants Attorney General,
Of Counsel for Appellant, Ben F. Looney, Attorney General of the State of Texas.

APPENDIX.

PROVISIONS OF THE CONSTITUTION AND LAWS OF TEXAS RELATING TO PERMITS AND FRANCHISE TAXES OF FOREIGN CORPORATIONS.

ART. 3837. *Fees of State Department.*—For each foreign corporation obtaining permit to do business in this State shall pay fees as follows: Fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this State, shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, so-called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each additional one hundred thousand dollars, or a fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the State of Texas. (Acts 1907, S. S., p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p. 87. Acts 1883, p. 72. Acts 1909, S. S., p. 267.)

ART. 3840. *Fees Paid in Advance to Secretary and by Him to Treasury Monthly.*—All fees mentioned in Articles 3837 and 3838 shall be paid in advance into the office of the Secretary of State, and shall be by him paid into the State Treasury monthly. (Id.)

CONSTITUTION OF THE STATE OF TEXAS.

ARTICLE IV.

SEC. 22. The Attorney General shall hold his office for two years and until his successor is duly qualified. He shall represent the State in all suits and pleas in the Supreme Court of the State

in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power, or demanding or collecting any species of taxes, toll, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law. He shall reside at the seat of government during his continuance in office. He shall receive for his services an annual salary of two thousand dollars, and no more, besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually.

Chapter III.

FRANCHISE TAX.

Art. 7393. *Tax to be Paid by Domestic Corporations.*—Except as herein provided, each and every private domestic corporation heretofore chartered, or that may hereafter be chartered, under the laws of this State, shall on or before the first day of May of each year, pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows, viz.: Fifty cents on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, unless the total amount of capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be fifty cents on each one thousand dollars of capital stock of such corporation issued and outstanding, plus its surplus and undivided profits; provided, that such franchise tax shall not in any case be less than ten dollars; provided, that, where the authorized capital exceeds one million dollars, such franchise tax shall be fifty cents for each one thousand dollars up to and including one million dollars, and for each additional one thousand dollars, in excess of one million dollars, it shall be twenty-five cents. (Acts 1907, p. 503, Sec. 1.)

ART. 7394. *Tax to be Paid by Foreign Corporations.*—Except as herein provided, each and every foreign corporation, authorized, or that may hereafter be authorized to do business in this State, shall, on or before the first day of May of each year, pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows, viz.: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars or fractional part thereof of such stock in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars and two dollars on each five thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars, and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten million dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars. (Id., Sec. 2.)

ART. 7395. *Only Part of Tax to be Paid, When.*—Whenever a private domestic corporation is chartered in this State, and whenever a foreign corporation is authorized to do business in this State, and such corporation shall be required to pay in advance to the Secretary of State, as it franchise tax from that time down to and including the thirtieth day of April next following, only such proportionate part of its annual franchise tax,

as hereinabove prescribed, as the period of time between the date of filing of its articles of incorporation or the issuance of its permit to do business, as the case may be, and on the first day of May next following, bears to a calendar year. (Id., Sec. 3.)

ART. 7396. *Certain Affidavits May be Required.*—For the purpose of determining the amount of the first franchise tax payment required by this chapter of any domestic corporation, which may be hereafter chartered, or of any foreign corporation which may hereafter apply for a permit to do business within this State, and also for the purpose of determining the correctness of any report which is provided for in this chapter, the Secretary of State may, whenever he may deem it necessary or proper to protect the interests of the State, require any one or more of the officers of such corporations to make and file in the office of the Secretary of State an affidavit or affidavits in writing, which shall be subscribed by such officer, and by him sworn to before some officer who is by law duly authorized to administer oaths, and verified by his seal of office, setting forth fully the facts concerning the amount of the surplus and undivided profits, respectively, if any, of such domestic or foreign corporation; and until the Secretary of State shall be fully satisfied as to the amount of such surplus and undivided profits, respectively, if any, he shall not file the articles of incorporation of such proposed domestic corporation, or issue such permit, or accept such franchise tax. (Id., Sec. 4.)

ART. 7397. *Reports to be Filed, Etc.*—For the purpose of ascertaining and determining the amount of any annual franchise tax prescribed by this chapter, excepting only the first tax to be paid by any domestic corporation, which may hereafter be chartered, or of any foreign corporation which may hereafter be authorized to do business in this State, the president, vice-president, general manager, secretary, treasurer and superintendent of each and every domestic or foreign corporation embraced within the provisions of this chapter shall annually and between the first and tenth days of March, and also whenever called upon by the Secretary of State to do so, report to the Secretary of State, in writing, and under oath, as required by the preceding article, the total amounts of the capital stock issued and outstanding, and the surplus and undivided profits, respectively, if any, of such corporation on the first day of March next preceding; and

the Secretary of State may ascertain such facts from othe sources; and, if the true aggregate of such amounts shall excee the authorized capital stock of such corporation as disclosed b its then current original or amended articles of incorporation, th amount of its annual franchise tax for the year beginning th first day of May next thereafter shall be thereon collected an paid; otherwise, its annual franchise tax shall be calculated an paid upon the amount of its authorized capital stock as show by its aforesaid original or amended articles of incorporatio The making and filing by any one of such officers of such co poration of the record required by this article shall relieve th other officers of such corporation from the duty of making an report required by this article, except such report or reports a may be required by the Secretary of State. (Id., Sec. 5.)

ART. 7397a. *Reports to be Filed; Basis of Tax.*—All corpo rations that are now required by law to pay an annual franchis tax, shall, between the first day of January and the first day February of each and every year, be required to make a repo to the Secretary of State, on blanks furnished by him, whic report shall give the authorized capital stock of the corporatio the capital stock issued and outstanding, the surplus and und vided profits of the corporation, the names and addresses of a the officers and directors of the corporation, the amount of mor gages, bonded or other indebtedness of each corporation, and th amount of the last annual, semi-annual or quarterly dividen If the capital stock issued and outstanding plus the surplus an undivided profits shall exceed the authorized capital stock, th franchise tax shall be based on this amount instead of the au thorized capital, but if it shall be less, then the franchise ta shall be based on the amount of capital stock, but no corpor tion shall be required to pay a greater rate of franchise tax b reason of its having a surplus than a corporation that has n surplus. (Acts 1913, p. 327, Sec. 1.)

ART. 7397b. *Penalty for Failure to Make Report, Etc.*—An corporation which shall fail or refuse to make the report as pr vided in Section 1 hereof (Art. 7397a), shall be subject to fine of ten dollars for each and every day after the first day February that they shall fail to make such report. The Atto ney General of this State is hereby empowered and directed bring suit against such corporation in either of the district cour

of Travis county, in the name of the State of Texas for the collection of such penalties that may be due by reason of such failure. (Id., Sec. 2.)

ART. 7397c. *Reports, Privileged, Etc.*—The reports required by this Act shall be deemed to be privileged and not for the inspection of the general public, but any party or parties who are interested in the subject matter of any report may, upon valid request in writing made to the Secretary of State, secure a copy of same. (Id., Sec. 3.)

ART. 7397d. *May be Made by What Officers; How Executed, Etc.*—The following officers of each and every corporation shall be deemed competent to make the report required by this Act: The president, vice-president, secretary, treasurer or general manager, and all reports provided for in this Act shall be signed officially and sworn to before some officer authorized by law to administer oaths. (Id., Sec. 4.)

ART. 7397e. *Laws Repealed, Etc.*—All laws and parts of laws in conflict with this Act are hereby repealed, but where this Act is not in conflict with any existing law it shall be held to be amendatory thereof. (Id., Sec. 5.)

ART. 7398. *Supplemental Tax to be Paid When Capital Increased.*—In the event of increase in the authorized capital stock of any domestic or foreign corporation, it shall also pay in advance a supplemental franchise tax thereon for the remainder of the year down to and including the thirtieth day of April next thereafter, the amount of which shall be determined as is provided in Article 7395 in case of the first franchise tax payment to be made under this chapter by a domestic corporation which may be hereafter authorized to do business within this State. (Acts 1907, p. 503, Sec. 6.)

ART. 7399. *Failure to Pay Tax; Charter Forfeited, When; Penalty.*—Any corporation, either domestic or foreign, which shall fail to pay any franchise tax provided for in this chapter when the same shall become due and payable under the provisions of this chapter shall thereupon become liable to a penalty of twenty-five per cent of the amount of such franchise tax due by such corporation; and, if the amount of such tax and penalty be not paid in full on or before the first day of July there-

after, such corporation shall for such default forfeit its right to do business in this State; which forfeiture shall be consummated without judicial ascertainment by the Secretary of State entering upon the margin of the record kept in his office relating to such corporation the words, "right to do business forfeited," and the date of such forfeiture; and any corporation whose right to do business shall be thus forfeited shall be denied the right to sue or defend in any other courts of this State, except in a suit to forfeit the charter of such corporation; and, in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief shall be granted to such corporation, unless its right to do business in this State shall be revived as provided by this chapter. And each and every director and officer of any corporation whose right to do business within this State shall be so forfeited shall, as to any and all debts of such corporation which may be created or incurred, with his knowledge, approval and consent, within this State, after such forfeiture by any such directors or officers, and before the revival of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such directors and officers of such corporation were partners. (Id., Sec. 8.)

ART. 7400. *Notice of Forfeiture.*—The Secretary of State shall, during the month of May of each year, notify each domestic and foreign corporation which may be or become subject to a franchise tax under any law of this State, which has failed to pay such franchise tax on or before the first day of May, that unless such overdue tax together with said penalty thereon shall be paid on or before the first day of July next following, the right of such corporation to do business in this State will be forfeited without judicial ascertainment. Such notice may be either written or printed and shall be verified by the seal of the office of the Secretary of State, and shall be addressed to such corporation and mailed to the postoffice named in its articles of incorporation as its principal place of business, or to any other known place of business of such corporation; and a record of the date of mailing such notice shall be kept by the Secretary of State. Such notice and said record thereof shall constitute legal and sufficient notice thereof for all the purpose of this chapter. Any corporation whose right to do business may have been for-

feited, as provided in this chapter, shall be relieved from such forfeiture by paying the Secretary of State any time within six months after such forfeiture the full amount of the franchise tax and penalty due by it, together with an additional amount of five per cent of such tax for each month, or fractional part of a month, which shall elapse after such forfeiture; provided, that such amount shall in no case be less than five dollars. When such tax and all such penalties shall be fully paid to the Secretary of State, he shall revive and reinstate the right of the corporation to do business within this State by cancelling the words, "right to do business forfeited," upon his record and endorsing thereon the word, "revived," and the date of such revival. If any domestic corporation whose right to do business within this State shall hereafter be forfeited under the provisions of this chapter, shall fail to pay the Secretary of State, on or before the first day of January next following the revival, amounts necessary to entitle it to have its right to do business revived under the provisions of this chapter, such failure shall constitute sufficient grounds for the forfeiture, by judgment of any court of competent jurisdiction, of the charter of such domestic corporation. (Id., Sec. 9.)

ART. 7400a. *Cancellation of Forfeiture in Certain Cases; Forfeiture by Judgment, When, Etc.*—Every private corporation heretofore chartered under the laws of this State, whose charter or right to do business, and every foreign corporation whose right to do business within this State has heretofore been forfeited as provided by law, solely and only because of its failure to pay, within the time provided by law any frachise tax or taxes and penalty or penalties prescribed by law for failure to pay such tax or taxes when due, shall be permitted and authorized to pay to the Secretary of State on or before the first day of September, A. D. 1913, the aggregate amount of its franchise tax or taxes and the penalty or penalties thereon as provided by law, calculated for the entire period of time beginning with the day upon which the first unpaid franchise tax payment became due and ending with the day of such payment; and upon such payment being made to the Secretary of State he shall cancel such previous forfeiture of the right of such corporation to do business within this State and shall endorse upon the margin of the record kept in his office relating to such corporation the word

"Revived," and the date of such revival. Failure of any such domestic corporation to pay such aggregate amount on or before the first day of September, A. D. 1913, shall constitute sufficient grounds for the forfeiture by a judgment of any court of competent jurisdiction of the charter of such domestic corporations; provided, that none of the provisions of this section shall apply to any corporation whose right to do business within this State, or whose charter may have been legally forfeited for any other reason than that of failure to pay such franchise tax or taxes and such penalty or penalties.

Provided that this Act shall not in any manner affect any litigation by or against any corporation, which cause of action or defense to any cause of action originated since the forfeiture of the charter or cancellation or permit and prior to the time of taking advantage of this Act. (Acts 1907 (1st Ex. Sess.), Ch. 23, Sec. 10. Amended Acts 1911, p. 91, Sec. 1. Acts 1913, p. 334, Sec. 1.)

ART. 7401. *Foreign Corporations May Withdraw.*—Should any foreign corporation which may have or hereafter obtain a permit to do business within this State desire at any time to withdraw from doing business in this State, it may surrender such permit to the Secretary of State, who shall thereupon mark or stamp such permit, "Surrendered," dating and signing same officially, and shall endorse upon the record of such permit in his office the word, "Surrendered," and the date thereof; and thereafter such corporation may, by complying with the provisions of this chapter, secure a new permit to do business in this State without having made any further payment of franchise tax under such old permit. (Acts 1907, p. 503, Sec. 11.)

ART. 7402. *No Business to be Done After Forfeiture; Penalty.*—In any and all cases in which the charter, or right to do business, of any private domestic corporation, heretofore or hereafter chartered under the laws of this State, or the permit of any foreign corporation, or its right to do business within this State, shall have been or shall hereafter be forfeited, it shall be unlawful for any person or persons who were or shall be stockholders, or officers, of such corporation at the time of such forfeiture to do business within this State, in or under the corporate name of such corporation, or to use signs or advertisements of

such corporation or similar to the signs or advertisements which were used by such corporation before such forfeiture; and each and every person who may violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in the Penal Code; provided, the inhibition and penalties prescribed by this article shall not apply where the right of such corporation to do business within this State has been revived in the manner provided by law and is at the time in good standing. (Id., Sec. 12.)

ART. 7403. *Certain Corporations Not Required to Pay Tax, When.*—The franchise tax imposed by this chapter shall not apply to any insurance company, surety, guaranty, or fidelity company, or any transportation company, or any sleeping, palace car and dining car company which is now required to pay an annual tax measured by their gross receipts, or to corporations having no capital stock and organized for the exclusive purpose of promoting the public interest of any city or town, or to corporations organized for the purpose of religious worship, or for providing places of burial not for private profit, or corporations organized for the purpose of holding agricultural fairs and encouraging agricultural pursuits, or for strictly educational purposes, or for purely public charity. (Id., Sec. 13.)

ART. 7404. *Attorney General to Bring Suit, When.*—The Attorney General shall be authorized, and it shall be his duty, to bring suit therefor against any and all such corporations which may be or become subject to or liable for any and all franchise tax or taxes or penalties under this or any former law; and, in case there may now be or shall hereafter exist valid grounds for the forfeiture of the charter of any domestic private corporation, or failure to pay any franchise tax or franchise taxes or penalty or penalties to which it may have become or shall hereafter be or become subject or liable under this or formerr law, it shall be his duty to bring suit for a forfeiture of such charter; and, for the purpose of enforcing the provisions of this chapter by civil suits, venue is hereby conferred upon the courts of Travis county concurrently with the courts of the county in which the principal office of such corporation may be located as shown by its articles or amended articles of incorporation. Such courts shall also have authority to restrain and enjoin a violation of any and all of the provisions of this chapter. In any and all cases in which any

court having jurisdiction thereof shall make and enter judgment forfeiting the charter of any such corporation, the court may appoint a receiver thereof and may administer such receivership under the laws regulating receiverships. (Id., Sec. 14.)

ART. 7405. *Forfeiture of Charter By Court; Duty of Clerk.*—Upon the rendition by the district court of any judgment or forfeiture under the provisions of this chapter, the clerk of that court shall forthwith mail to the Secretary of State a certified copy of such judgment; and, upon receipt thereof, he shall endorse upon the record of such charter in his office the words, "judgment of forfeiture," and the date of such judgment. In the event of an appeal from such judgment by writ of error or otherwise the clerk of the court from which such appeal is taken shall forthwith certify to the Secretary of State the fact that such appeal has been perfected, and he shall endorse upon the record of such charter in his office the word, "appealed," and the date upon which such appeal was perfected. When final disposition of such appeal shall be made, the clerk of the court making such disposition thereof shall forthwith certify such disposition and the date thereof to the Secretary of State, who shall briefly note same upon the record of such charter in his office and the date of such final disposition. (Id., Sec. 15.)

ART. 7406. *Payment of Tax by Corporation in Process of Liquidation.*—In case a corporation is actually in process of liquidation, such corporation shall only be required to pay a franchise tax calculated upon the difference between the amount of stock actually issued and the amount of liquidating dividends actually paid upon such stock; provided, that the president and secretary of such corporation shall make affidavit as to the total amount of capital stock issued and as to the amount of liquidating dividends actually paid and that such corporation is in an actual bona fide state of liquidation. (Id., Sec. 15a.)

PENAL CODE.

ART. 148. *Persons or Corporations Liable for Franchise Tax Failing to Make Report.*—Every person required by the law prescribing franchise taxes to be paid by corporations to make any annual report to the Secretary of State, who shall, for a longer period than five days, and every person who shall, for more than

ten days after the mailing by the Secretary of State demand upon him for any other report, which the Secretary of State is by this law authorized to require, fail or refuse to make such report, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty dollars and not more than two hundred dollars; and each day of such failure or refusal after the expiration of said five days or said ten days, as the case may be, shall constitute a separate offense. The Secretary of State shall keep a record of the mailing of any and all notices and demands for reports provided for by this law.

PENAL CODE.

ART. 149. *Charter or Right to Do Business of Corporations Forfeited; Right of Officers to Do Business in Corporate Name Ceases.*—In any and all cases in which the charter or right to do business of any private domestic corporation, heretofore or hereafter chartered under the laws of this State, or the permit of any foreign corporation or its right to do business within this State, shall have been, or shall hereafter be, forfeited, it shall be unlawful for any person or persons who were or shall be stockholders, or officers of such corporation at the time of such forfeiture to do business within this State in or under the corporate name of such corporation, or to use signs or advertisements of such corporation or similar to the signs or advertisements which were used by such corporation before such forfeiture; and each and every person who may violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars and not more than one thousand dollars; provided, the inhibition and penalties prescribed by this article shall not apply where the right of such corporation to do business within this State has been revived in the maner provided by law and is at the time in good standing.

PENAL CODE.

ART. 1487. *When Charter or Permit of Corporation Forfeited, Members or Officers of Such Corporation Prohibited from Using Old Corporate Name.*—When any charter or permit, heretofore or hereafter granted under the laws of the State of Texas to any corporation to do business in said State, shall have been forfeited,

it shall be unlawful for any persons who were members or officers of said defunct corporation at the time of such forfeiture to do business in Texas under the old corporate name of such corporation, or to use the same or like signs or advertisements which were used by such corporation before such forfeiture; and any such person, so violating this law, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not more than one thousand dollars, nor less than two hundred and fifty dollars; provided, this shall not apply where the charter of a corporation has been revived in the manner provided by law, and is at the time in good standing. (Acts 1907, p. 34, Sec. 4; Acts 1905, p. 335.)

ORDER GRANTING INTERLOCUTORY INJUNCTION.

Filed and Entered December 21, 1914.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS. IN EQUITY.

No. 2782.

CRANE COMPANY

vs.

BEN F. LOONEY ET AL.

On the filing of plaintiff's original bill praying for an interlocutory injunction restraining the Attorney General of Texas and the Secretary of State of Texas from enforcing against the plaintiff the statutes of the State of Texas requiring every foreign corporation of the class of plaintiff, which is engaged in doing business in the State of Texas, to pay a permit fee and a franchise tax, the District Judge, Honorable Edward R. Meek, to whom said bill was presented as an application for an injunction, called to his assistance Honorable Richard W. Walker, United States Circuit Judge for the Fifth Circuit, and Honorable Rhydon N. Call, United States District Judge for the Northern District of Florida, and after more than five days' notice of the hearing had been given to each of the defendants, one of whom is the Attorney General of the State of Texas, and to the Honorable Oscar Branch Colquitt, Governor of the State of Texas, the said application came on for hearing at Fort Worth, Texas, before the said judges on the 13th day of November, 1914. The judges

having heard the testimony and argument of counsel, find on the facts put in issue by the pleadings as follows:

That the plaintiff, Crane Company, under its charter, is engaged in the business of manufacturing, buying, selling and otherwise dealing in various lines of hardware, builders' supplies and material, and agricultural machinery and supplies; that more than twenty years ago plaintiff, Crane Company, entered the State of Texas with its goods, wares and merchandise, selling them through traveling salesmen who took orders and sent them to the plaintiff's principal office and place of business at Chicago, Illinois, for acceptance and filling through shipment; that plaintiff, Crane Company, received, accepted and filled orders and sent it through the mails for merchants living in Texas; that for many years plaintiff, Crane Company, has been engaged in interstate commerce between Texas and the other States of the Union; that for the purpose of facilitating the transaction of its business and in order that it might the more conveniently serve those with whom it transacted said interstate commerce, Crane Company established agencies throughout the country, one of which was an agency established at Dallas, Texas, in 1904.

That during the year 1905 plaintiff, Crane Company, applied for and secured from the Secretary of State of the State of Texas a permit to do business within the State for the succeeding ten years; that during the time intervening between the year 1906 and the time of the filing of plaintiff's bill it has conducted an extensive interstate and intrastate business and has made permanent investments in the city of Dallas, Texas, in the way of a lot, building and equipment for the more efficient and economical conduct of such business; that plaintiff's permit to do an intrastate business in the State of Texas expires on the 15th day of January, 1915, and that the period covered by plaintiff's present franchise tax expires on May 1, 1915, and that plaintiff, Crane Company, will not apply for a permit on or after January 15, 1915, nor pay a franchise tax on or after May 1, 1915; that the defendants, the Attorney General and the Secretary of State, will undertake to enforce the permit and franchise tax laws against Crane Company unless enjoined, and that the enforcement of the provisions of such laws by the defendants in their official capacities will annoy, harass and impede plaintiff in its business in interstate commerce and its intrastate business inseparably connected therewith and oust Crane Company from doing an intra-

state business in Texas; that the collection from plaintiff by the Secretary of State of taxes under the provisions of Articles 3837 and 7394 of the Revised Statutes of Texas, 1911, as a necessary effect, will impose a burden on the interstate commerce business of the plaintiff and, as a necessary effect, will exact of the plaintiff a tax upon property not subject to taxation by the State of Texas.

The judges therefore conclude that as matter of law the interlocutory injunction should issue as prayed for.

It is therefore ordered that the defendant, Ben F. Looney, as Attorney General of the State of Texas, be and he is hereby enjoined, until further order of this court, from attempting in anywise to enforce against the plaintiff, Crane Company, the permit and franchise tax laws of the State of Texas relating to foreign corporations and from instituting any suit for the collection of any franchise taxes or penalties, or any suit to cancel the permit of the plaintiff to do business in Texas on the ground that it has failed to pay the fees required by the statutes of the State of Texas from foreign corporations doing business therein, and from instituting any suit against the plaintiff to enjoin it from transacting business in the State of Texas founded on the failure of the plaintiff to pay said permit fees or franchise taxes.

And it is therefore further ordered that the defendant, F. C. Weinert, as Secretary of State of the State of Texas, be and he is hereby enjoined until further order of this court from undertaking in any manner to enforce against plaintiff, or any of its officers, agents or stockholders, the permit or franchise tax statutes of the State of Texas relating to foreign corporations, and from making any entry in the books of his office signifying that the permit of the plaintiff to do business in Texas has been forfeited, and from issuing any certificate to any person whomsoever to the effect that the permit of the plaintiff to do business in Texas has been forfeited, and from issuing at any time, and especially on and after January 15, 1915, any certificate evidencing the fact that Crane Company's permit has expired, or evidencing the fact that Crane Company has failed or refused to pay a franchise tax, or to obtain any further or other franchise tax receipt, and from preparing, circulating, or furnishing to any person whomsoever a certified copy either of plaintiff's permit to do business in Texas, or of its franchise tax license or receipt for the franchise tax paid by Crane Company on May 1, 1914.

To the action of the court and judges in making said findings of fact and conclusions of law, and each of them, and in granting said interlocutory injunctions, and each of them, the defendants Ben F. Looney, as Attorney General, and F. C. Weinert, as Secretary of State, each excepted in open court at the time the same were announced, and each gave notice of an appeal from this order to the Supreme Court of the United States.

EDWARD R. MEEK,
United States District Judge.

Dated December 21, A. D. 1914.

MEMORANDUM OPINION.

MEEK, District Judge.—This case is brought by Crane Company, an Illinois corporation, against Ben F. Looney, as Attorney General of the State of Texas, and against F. C. Weinert, as Secretary of State of the State of Texas, for the purpose of restraining the defendants in their official capacities from enforcing against plaintiff the provisions of Articles 3837 and 7394 of the Revised Statutes of Texas (1911).

It appears from plaintiff's bill and from the evidence that under its charter it is engaged in the business of manufacturing, buying, selling and otherwise dealing in various lines of hardware, builders' supplies and material, and agricultural machinery and supplies; that more than twenty years ago plaintiff entered the State of Texas with its goods, wares and merchandise, selling them through traveling salesmen who took orders and sent them to the plaintiff's principal office and place of business at Chicago, Illinois, for acceptance and filling through shipment; that it received, accepted and filled orders sent it through the mails from merchants living in Texas; that for many years it has been engaged in interstate commerce between Texas and the other States of the Union; that for the purpose of facilitating the transaction of its business and in order that it might the more conveniently serve those with whom it transacted such commerce it established agencies throughout the country, an agency having been established in Dallas, Texas, in 1904.

It also appears that during the year 1905 the plaintiff applied for and secured from the State of Texas a permit to do business within the State for the succeeding ten years; that during the time intervening between the year 1906 and the time of the fil-

ing of this bill it has conducted an extensive interstate and intrastate business and has made permanent investments in the city of Dallas, Texas, in the way of a lot, building and equipment for the more efficient and economical conduct of such business.

It is shown that plaintiff's present permit to do an intrastate business in Texas expires on the 15th day of January, 1915, and plaintiff avers that it will not apply to the Secretary of State for a renewal of this permit, nor meet the conditions in the way of the payment of fees necessary to secure such permit; that it will not at the expiration of the present franchise tax on May 1, 1915, pay a franchise tax in compliance with the laws of the State for the fiscal year ending May 1, 1916. Plaintiff further avers that the defendants, the Attorney General and the Secretary of State, will undertake to enforce the laws of the State of Texas against it, and it will thereby be harassed, annoyed and impeded in transacting its business in interstate commerce and the business inseparably connected therewith and will also be ousted from doing an intrastate business in said State.

The plaintiff assails the validity of Articles 3837 and 7394 of the Revised Statutes of Texas (1911), and alleges that their provisions are in violation of the rights of plaintiff guaranteed to it under the Constitution of the United States, Article 1, Section 8, paragraph 4, which, among other things, grants the Congress the power to regulate commerce among the several States, and under the first section of the Fourteenth Amendment to the Constitution of the United States, which guarantees plaintiff against being deprived by any State of its property without due process of law and against being deprived of the equal protection of the law. The part of Article 3837 applicable to the plaintiff and here complained of is as follows:

"*For* each foreign corporation obtaining permit to do business in this State shall pay fees as follows: Fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this State shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, so-called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty

dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each additional one hundred thousand dollars, or a fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the State of Texas. (Acts 1907, S. S., p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p. 87. Acts 1883, p. 72. Acts 1909, S. S., p. 267.)"

Article 7394 is as follows:

"ART. 7394. *Tax to be Paid by Foreign Corporations.*—Except as herein provided, each and every foreign corporation, authorized, or that may hereafter be authorized to do business in this State, shall on or before the first day of May of each year pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows, viz.: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars or fractional part thereof, of the authorized capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten million

dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars. Act 1907, p. 503, Sec. 2."

It is revealed that the business of plaintiff under its charter is not itself commerce. It is engaged in the manufacture and sale of certain goods and in the purchase and sale of the goods of other manufacturers. The greater part of these goods are disposed of in interstate commerce, and a small portion in intrastate commerce in Texas. A decided preponderating percentage of the plaintiff's property is located outside the State of Texas. The same preponderating percentage of its business is done outside the State.

By the terms of the above statutes the State sought to fix upon certain classes of foreign corporations an excise tax for the privilege of exercising their franchises within the State of Texas; that a franchise tax of this character is within the power of the State to levy, there can be no question. Maine vs. Grand Trunk Railway Co., 142 U. S., 228.

The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact from the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. Home Insurance Company vs. New York State, 134 U. S., 594. However, a State cannot say to a corporation: "You may do business within our borders if you permit your property to be taken without due process of law, or, you may transact business in interstate commerce subject to the regulatory power of the State. To allow a State to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union; but a tax levied by the State upon the right of a corporation to do business in the State (that is, a franchise tax), will not be validated unless its necessary effect is to burden interstate commerce." Baltic Mining Company vs. Massachusetts, 231 U. S., 68.

Does compliance by the plaintiff with the statutes here complained of impose a burden upon interstate commerce, or violate the provisions of the first section of the Fourteenth Amendment to the Constitution? The necessary effect of the enforcement of the two statutes brought into question is to make the plaintiff's

right to do a Texas intrastate business dependent upon the payment of a sum which becomes greater or less according as its assets outside of the State and its interstate and foreign business grows greater or smaller, though its property situated in Texas and its intrastate business there may remain stationary. The case of the Baltic Mining Company, cited supra, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the State or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more or less than the amount of the par value of its authorized capital stock and whatever may have been the nature or extent of the business in which it was engaged. Nothing said in the opinion rendered in that case indicates the court's departure from or modification of the rule announced in Western Union Telegraph Company vs. Kansas, 216 U. S., 1, and 42, to the effect that a State may not forbid the doing of a local business within its limits by a corporation of another State or foreign country except subject to the condition that such corporation first pay to the State a given per cent of its entire capitalization, representing the value of all its business, property and interests within and without the State, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the State for purposes of taxation. The joint effect of the two statutes, considered together, as they must be, as the right of the corporation to do business in the State is withheld, if either of them is not complied with, is to make the privilege of doing a local business in Texas subject to the condition that it shall first pay to the State a given per cent of all its capital and surplus, representing all of its property wherever situated, and all its business, interstate and intrastate. An imposition which is based, whether in whole or in substantial part, on the value of the property outside of the State, or on interstate or foreign commerce engaged in, so that the amount of it grows

in exact proportion to the growth of such property or commerce is a burden on such property or commerce. This burden the State cannot impose either directly or as a condition to the grant of a privilege which it may confer or withhold. The statutes in question so obviously impose such a burden that it is not permissible to regard them as privilege taxes or excises, the amount of which is determined by something not having a necessary relation to the amount or value of things which are not subject to the State's taxing power. The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to State taxation, and being greater or less according as such property or business is greater or less, the necessary effect of the enforcement of them is to burden such property or business. The court is therefore constrained to grant the preliminary injunction prayed for, and an order will be entered accordingly.

SUBJECT INDEX.

LIST OF CASES.

CONSTITUTIONAL PROVISIONS AND STATUTES.

180-1017-75

No. 16.

(Old No. 351.)

In the Supreme Court of the United States

OCTOBER TERM, 1917

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, APPELLANT,

vs.

CRANE COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLANT.

Since this case was briefed originally, cases somewhat similar in principle have been passed upon by the court, and counsel have had the advantage of listening to the argument before this court of the Cheney Brothers Co. case and other cases involving the Massachusetts statute, which were submitted on October 19, 1917. We deem it, therefore, appropriate to supplement the brief and argument made by us in our original brief, but will avoid a repetition of what was there said, so that the remarks here made will be only in aid of and supplementary to the original brief filed in this case for the appellant.

We will discuss, first, the Texas permit fee statute, separately considered; second, the franchise tax act as a whole and separately considered; third, the effect of a partial invalidity of the franchise tax act, if the court should find any part of the same invalid; fourth, the status of the Texas laws in the event the per-

mit fee and franchise tax laws, or either of them, should be void, and the right of Crane Company to an injunction in such event.

I.

The Texas Permit Fee Statute Separately Considered.

Our permit fee statute is a part of Title 58, Chapter 1, Revised Statutes of the State, which title is "Fees of Office," and it has always been a part of the title fixing fees of office to be charged by the Secretary of State. The permit fee for foreign corporations is a part of Article 3837, Revised Statutes of 1911, which article fixes the fees to be charged for filing charters and amendments to charters of domestic corporations, the fees to be charged for commissions issued to all public officers of the State, the fees which may be charged for certificates, requisitions and copies of any document on file, and which fixes the permit fees to be paid by foreign corporations. This article is a part of the chapter which prescribes the fees to be charged by all public officers of the State. In other words, it is a part of the general fee bill of the State. In the appendix at the back of this written argument, we have given a fairly comprehensive history of the legislation in this State resulting in the permit fee and franchise tax acts attacked in this case. This history discloses that the permit fee statute and other laws regulating the admission of foreign corporations belonged to an older, separate and distinct class of legislation to that levying franchise taxes. The permit fee, in fact, became a part of our statutes by the general foreign corporation act of 1889, while franchise taxes were not imposed on either domestic or foreign corporations until the Act of 1893, which last named measure was not passed as a part of the foreign corporation admission act, but as a part of the general taxation laws of the State. If the franchise tax act were stricken down, it would in no way affect the permit fee and foreign corporation acts, as such. The franchise tax law was passed as a part of the legislation levying a gross receipts and other forms of privilege

taxes against those engaged in various lines of business, and was incorporated into and became a part of the general taxation laws of the State, and is now Chapter 3, Title 126, Revised Statutes, which title is "Taxation." In other words, the permit fee and franchise tax acts are parts of separate and distinct legislation, and in no way so interdependent that the destruction of one would involve the destruction of the other. The entire franchise tax act might be repealed without in the least affecting the permit fee act. In fact, we had a permit fee act from 1889 until 1893 without there being any franchise tax law on the statutes of this State.

This much is said primarily for the reason that the insistence has been made that construing the permit fee act and the franchise tax act together, a burden is imposed on interstate commerce, and property beyond the boundaries of the State is taxed, and that, therefore, the permit fee and the franchise tax law must fall together if either of them should be held void. It is for this reason that we have compiled in the appendix to this brief a history of both classes of legislation, in which we have copied previous enactments when it is necessary to make clear the course of the legislation, and which does make clear that the destruction of one of these laws does not necessarily involve the destruction of the other.

The permit fee under our law corresponds to and is analogous to the charter fee which must be paid when domestic corporations are formed, and is precisely the same in amount; but both domestic and foreign corporations must afterwards each year pay franchise taxes, which likewise are substantially the same until a certain capitalization is reached, when the advantage is on the side of the foreign corporation. (See table of Franchise Taxes, page 93, "Principal Corporation Laws of Texas," on file in this case.) Our immediate inquiry is whether or not this permit fee is such a tax, when applied to the appellee, as is prohibited by the Federal Constitution. If it imposes a burden on interstate commerce, or taxes property not subject to taxation by the State,

then, of course, it is prohibited by the Constitution of the United States. We assume at the outset that the State cannot levy a tax on business which constitutes interstate commerce, nor can it lay a tax on the privilege of engaging in interstate commerce, nor can the State levy a tax on the receipts from interstate commerce, as such. (Kansas City Railway Co. vs. Kansas, 240 U. S., 230, and cases cited.)

Moreover, it must be held that in determining whether a tax has such a relation to interstate commerce as would be an exercise of powers prohibited by the commerce clause, the court will regard the substance of the exaction, its operation and effect as enforced, and will not depend on the manner in which the taxing scheme is characterized. (Kansas City Railway Company vs. Kansas, 240 U. S., 230.)

It is equally clear that the State has the right to tax a foreign corporation for the privilege of doing an intrastate business, and this tax is not rendered invalid because it is measured by capital stock, which, in part, may represent property not subject to the State's taxing powers. (Kansas City Railway Co. vs. Kansas, 240 U. S., 230.)

It is also manifest that the State is not barred from imposing a tax upon the granted privilege of being a corporation or exercising the power of a corporation because the corporation is engaged in interstate as well as intrastate commerce. (Kansas City Railway Co. vs. Kansas, 240 U. S., 230, and cases cited.)

And, agreeably to this principle, it has never been and cannot be maintained that a tax of this character is in itself and in all cases repugnant to the Federal power merely because it is measured by the authorized or paid-up capital stock of corporations. (Kansas City Railway Co. vs. Kansas, 240 U. S., 230); for, as is said in the case just cited:

"The selected measure may appear to be simply a matter of convenience in computation, and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing power."

Or, as was said quite recently in the case of Kansas City, Memphis & Birmingham Railway Co. vs. Styles, 242 U. S., 111:

"The State may not regulate interstate commerce, or impose burdens on it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

In determining the question at issue in this case there are four interrogatories to be asked, which lay bare the whole inquiry:

(a) Is the tax here laid on a business which is itself commerce?

It is not so laid, for the business of Crane Company is not commerce, and the opinion of Judge Meek, one of the trial judges who tried this case, so declares, as follows:

"It is revealed that the business of plaintiff under its charter is not itself commerce." (Tr., p. 57.)

(b) Is the tax laid on the privilege of engaging in interstate commerce?

Not at all. The Texas courts have long since answered this question in the negative. (Allen vs. Jones Buggy Co., 91 Texas, 22; Gaar-Scott Co. vs. Shannon, 223 U. S., 468. See other authorities, pages 23 and 24 of printed brief.)

(c) Is the tax on receipts from interstate commerce as such?

This question must be answered in the negative, for the tax is calculated against the *authorized* capital stock of the corporation, and is in no sense against its gross receipts; the fee is to be collected regardless of whether the corporation has ever had or ever will have any receipts from any commerce whatsoever.

(d) Does it tax property beyond the boundaries of the State?

We say not. We say that the method provided for determining the amount of the permit fee is merely a matter of convenience in calculation, and furnishes no basis whatever for the insistence that it subjects property beyond the State line to taxation. In the first place, the Constitution of Texas provides, in Section 1 of Article 8, that:

"Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value."

The same article of the Constitution gives the Legislature of the State authority to impose occupation taxes, both for natural persons and corporations doing any business in the State. It is provided that these occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. This same article of the State Constitution, in Section 11, declares that "all property shall be assessed for taxation, and the taxes shall be paid in the county where the property is situated."

It is clear from the foregoing that if this permit fee is a property tax, then, under the Constitution of our State, it could only be levied against property in the State; must be assessed against the property in the county where situated; and the assessment, in order to be equal and uniform, would necessarily be at the same rate that other property is taxed. So if it is a property tax, then it is plainly void under the Constitution of the State, whether it taxes property in or out of the State. Evidently, however, the permit fee was never intended to be a property tax. Moreover, it is not a property tax; for it in no sense depends upon the existence of property, either in or out of the State. It is calculated on the basis of the *authorized capital stock of the corporation, not on its actual capital,* and the tax would be the same whether the corporation had no capital whatever or had capital greatly in excess of the amount authorized by its charter. But if the permit fee is not a property tax, then it follows that it does not tax property, either within the State or without the State. It in no sense depends upon property; its amount hinges only on the authorized capital of the corporation, which may or may never be paid in whole or in part. Again, the usual characteristic of a property tax is that it is sufficient in size to raise revenue in some substantial amount while permit fees and franchise taxes are usually relatively small.

Our permit fee statute when examined and interpreted divides foreign corporations into two classes for the purposes of its exaction. That is, those having a capitalization of not exceeding $10,000, and those with a capital of exceeding that amount. In the first class the permit fee is $50. In the second class, the permit fee is $50 on the first $10,000, and $10 for each additional $10,000 of authorized capital or fractional part thereof. In the case of Crane Company, with its authorized capital of $17,000,000, the permit fee is $17,040, which is relatively a small amount, particularly when it is considered that the fee is to be paid only once every ten years and does not increase with the increase of either the authorized or real capital of the corporation. This amount of $17,040 will make a cost to Crane Company of one-tenth of one per cent for the ten-year life of the permit, or one one-hundredth of one per cent for each of the ten years. Or, to state it in another way, if Crane Company should pay this permit fee every ten years, it would be one hundred years before it would have paid therefor one per cent of its authorized capital; and it would take the payment of this sum every ten years for ten thousand years before its authorized capital would be exhausted. This illustration shows the vice in the contention that the permit fee is a property tax, or that its payment imposes a burden on interstate commerce. It is true enough that some money must be paid, but in amounts so small, compared to appellee's enormous authorized capital, as to be insignificant. Besides, as to the interstate commerce feature, the statute does not require Crane Company to pay this fee out of that part of its capital used in interstate commerce; but it may pay it out of funds used in intrastate commerce, or funds not used in commerce at all. Crane Company is engaged extensively in both intrastate and interstate commerce. Still, were it engaged exclusively in interstate commerce, and desired to engage in local business in any State, the exaction of a fee for the right to do such local business would not be void merely because the money to pay therefor would neces-

sarily come from interstate commerce. If so, permit fees could not be collected in any amount from corporations thus engaged.

All of which discussion shows the correctness of our conclusion, that the statutory method of calculating the permit fee is merely a convenient way of determining what the Legislature conceived to be a reasonable amount. It is true that the amount of any permit fee is not limited by the statute; but why should there be a limit? If the fee is not a property tax, the absence of a limit does not militate against it. If the fee should be levied against receipts from interstate commerce, no limit which might be specified in the statute would save the act from destruction. If this fee actually burdens interstate commerce, the presence of a limit would be of no avail. In other words, a limitation on the amount of the fee is not sufficient to save the statute, if it should from interstate commerce, as such, or if it should be concluded or that the tax is laid for the privilege of engaging in interstate commerce, or if it should be found that this fee taxes the receipts be found that the business of Crane Company is itself commerce, that the fee taxes property beyond the boundaries of the State.

The case of Albert Pick & Co. vs. Jordan, 169 Cal., 1, appears to be precisely in point. The case is stated by the Supreme Court of California as follows:

"Petitioner is a corporation, organized under the laws of the State of Illinois, for the purpose of manufacturing and selling and generally dealing in china, glassware, pottery, restaurant supplies, and other merchandise. It manufactures none of the enumerated articles in the State of California. However, as it avers, in its petition, it has for a long time been engaged in interstate commerce in these goods and wares between the State of Illinois, the State of California, and other States of the United States. It maintains a branch office and place of business in the city and county of San Francisco, and sells its goods, wares and merchandise in the city and county of San Francisco and in other States of the United States, and ships its goods, wares, and merchandise from the State of Illinois into the State of California and into other States, and from the State of California into other States. It has tendered to the Secretary of State for filing a certified copy

of its articles of incorporation with other appropriate papers required by the laws of the State, and the Secretary of State has refused to file the same excepting upon prepayment of the fee fixed by Section 416 of the Political Code (now 409, Pol. Code), and the fee prescribed by Section 2 of the act relating to revenue and taxation providing for a license tax on corporations. (Stats., 1905, p. 493.) Petitioner, refusing to pay the fees, made application to the superior court of the city and county of San Francisco for mandate against the Secretary of State directing him to file these papers without payment of the fee exacted by the terms of subdivision 4 of Section 409, above cited, and the corporation license tax of 1905.

"The Secretary of State answered, setting forth that the petitioner, besides the conduct of interstate commerce in which it is admittedly engaged, transacts 'a large volume of intrastate business within the State of California; that said intrastate business forms no part of and is neither inextricably nor necessarily connected with the interstate business of said company, and respondent further alleges that its said interstate business is nowise dependent upon the aforesaid intrastate business of said company; that the authorized capital stock of said company amounts to one million dollars.' A general demurrer to this answer was interposed and sustained, and the trial court filed its findings of fact and conclusions of law, wherein it declared in accordance with the allegations of the petition and awarded the mandate prayed for. The Secretary of State appealed from this judgment."

Section 409 of the Political Code of California was the statute in question in the Pick case. It was Section 416 of the same code in the Mulford case, but by amendment the section number was changed. (Albert Pick & Co. vs. Jordan, 169 Cal., 12.) That section of the code read as follows:

"The Secretary of State, for services performed in his office, must charge and collect the following fees:

* * * "4. For filing articles of incorporation, if the capital stock amounts to twenty-five thousand dollars or less, fifteen dollars; if the capital stock amounts to over twenty-five thousand dollars, and not over seventy-five thousand dollars, twenty-five dollars; if the capital stock amounts to over seventy-five thousand dollars, and not over two hundred thousand dollars, fifty dollars;

if the capital stock amounts to over two hundred thousand dollars, and not over five hundred thousand, seventy-five dollars; if the capital stock is over five hundred thousand dollars, and not over one million dollars, one hundred dollars; if the capital stock is over one million dollars, fifty dollars additional for every five hundred thousand dollars or fraction thereof of capital stock over and above one million dollars," etc. * * *

This statute plainly measures the permit fee by the capital stock of the corporation, and in that respect is somewhat less favorable than the Texas act, which determines the permit fee by reference to the *"authorized capital."* There is no limit on the amount of the permit fee. In this respect it is exactly like the Texas statute.

The Supreme Court of California held the California act valid (Albert Pick & Co. vs. Jordan, 169 Cal., 1-25.)

The Supreme Court of the United States affirmed the case. (37 Sup. Ct. Reporter, p. 741.)

The filing fee statute involved in the Pick case is not adversely distinguishable from the Texas permit fee statute, and the business of Crane & Co. is similar in its operation to that of Pick & Co.

If it be said that the fee is a large one, still the privilege granted is a large one, and, like the fee, is unlimited. Besides, the value of this privilege is a thing to be determined by the Legislature, and it is the privilege of Crane Company to buy the permit or let it alone, at the value fixed thereon by the Legislature.

The territorial extent of the privilege granted is a matter to be considered by the proper authority. The State of Texas comprises an area of 265,780 square miles or approximately one-thirteenth the area of the entire United States. It is much larger than Germany, France or Austria, and is more than twice the size of Great Britain. It is thirty-two times the size of the State of Massachusetts, and nearly four times the size of the average State of the Union. If each State of the Union were equal in area to Texas, the United States would cover one-fourth the land area of the world, or if each State were the size of Texas, with

the present area of the United States we would have but thirteen States instead of forty-eight. The territory of Texas, enormous in extent, contains many thousands of towns and cities, and has a population of five millions of people. It is a State of vast wealth, and unbounded business possibilities, where population, wealth and commerce are probably increasing faster than in any other equal area in the world.

When a permit is issued for ten years the corporation obtaining same, under the Revised Statutes, Article 1317, of Texas, "shall have and enjoy all the rights and privileges conferred by the laws of this State on corporations organized under the laws of this State," which rights and privileges are substantially those of natural persons, and in general terms are set forth in the statutes.

That the right to transact business in Texas is a valuable privilege is shown by the actual results in Crane Company's experience.

Crane Company's total investment throughout the United States is $25,139,000; its total sales were $39,831,000, or about one and one-half times its capital; its sales in Texas were $1,109,750, while the capital employed in Texas was $301,179, its sales in Texas being, therefore, nearly four times its capital employed in Texas; or, stated another way, although only one and one-tenth per cent of its capital was employed in Texas, still two and five-tenths per cent of its business comes from Texas.

The facts simply show that the privilege of doing business in Texas is a valuable one, and that the Legislature of Texas, in fixing the amount of permit fees, did not act arbitrarily and without warrant of fact.

This much ought, also, to be considered, that the State cannot sell an unlimited number of permits to corporations of this character. The number of dollars which will be invested in business is limited by the necessities and demands of trade. One of the most usual and the only lawful method of obtaining a substantial monopoly of any business is by an enormous capitalization.

The admission of Crane Company into the State, with its great capital, means that, at least for the time being, but few, if any other, corporations of similar purpose will be chartered or seek admission into the State. Smaller concerns cannot and will not undertake to compete with it. The sale of this privilege to Crane Company means that fewer sales of the same character of privilege will be made to other concerns. Can it be said that the Legislature fixed the permit fee too high, and at an unreasonable figure? The charter fee of domestic corporations is the same, and there have been chartered and admitted into the State many thousands of corporations since this permit fee was fixed.

OPINION OF THE TRIAL COURT AND THE PERMIT FEE STATUTE.

The trial court did not consider the permit fee statute separately and disconnected from the franchise tax act, but considered the two together, and it was the "joint effect" of the two which the court condemned. In the memorandum opinion the court said:

"The necessary effect of the enforcement of the two statutes brought into question is to make the plaintiff's right to do a Texas intrastate business dependent upon the payment of a sum which becomes greater or less according as its assets outside of the State and its interstate and foreign business grow greater or smaller, though its property situated in Texas and its intrastate business there may remain stationary. The case of the Baltic Mining Company, cited supra, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the State or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more or less than the amount

of the par value of its authorized capital stock and whatever may have been the nature or extent of the business in which it was engaged. Nothing said in the opinion rendered in that case indicates the court's departure from or modification of the rule announced in Western Union Telegraph Company vs. Kansas, 216 U. S., pp. 1 and 42, to the effect that a State may not forbid the doing of a local business within its limits by a corporation of another State or foreign country except subject to the condition that such corporation first pay to the State a given per cent of its entire capitalization, representing the value of all its business, property and interests within and without the State, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the State for purposes of taxation. The joint effect of the two statutes, considered together, as they must be, as the right of the corporation to do business in the State is withheld if either of them is not complied with, is to make the privilege of doing a local business in Texas subject to the condition that it shall first pay to the State a given per cent of all its capital and surplus, representing all of its property wherever situated, and all its business, interstate and intrastate. An imposition which is based, whether in whole or in substantial part, on the value of the property outside of the State, or on interstate or foreign commerce engaged in, so that the amount of its growth in exact proportion to the growth of such property or commerce is a burden on such property or commerce. This burden the State cannot impose either directly or as a condition to the grant of a privilege which it may confer or withhold. The statutes in question so obviously impose such a burden that it is not permissible to regard them as privilege taxes or excise, the amount of which is determined by something not having a necessary relation to the amount of value of things which are not subject to the State's taxing power. The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to State taxation, and being greater or less according as such property or business is greater or less, the necessary effect of the enforcement of them is to burden such property or business." (Tr., pp. 58 and 59.)

Nothing here said in condemnation of the joint effect of the

two statutes can apply to the permit fee statute when considered alone. The permit fee as in the case of the exaction of the Baltic Mining Company case is determined by reference to the authorized capital, and not by reference to assets or business, nor does it "fluctuate with the amount of interstate commerce."

Considered singly and alone—and the State is already entitled to have it so considered—our permit feet act is subject to none of the restrictions urged against it, and the appellant should not have been enjoined from enforcing the same.

II.

Franchise Tax Act as a Whole and Separately Considered.

Our franchise tax act, as applied to foreign corporations, is Article 7394, Revised Statutes, and, when analyzed, divides foreign corporations into two classes for the purpose of determining the amount of the tax, towit: First, those having an authorized capital stock but without surplus or undivided profits, and, second, those which have surplus or undivided profits in addition to an authorized capital. In the first class the tax is determined by taking into consideration the authorized capital, and in the second class the authorized capital, together with surplus and undivided profits, is considered. In our original brief, we have discussed the validity of this act on the basis that, since, as to this class of corporations, the State has the absolute right of exclusion, Crane Company cannot complain of the method of determining the tax or of the State's reason for excluding it. It is only necessary here to recall that Crane Company is an ordinary mercantile corporation doing a wholesale and retail intrastate and interstate business, and that it does not belong to that class of cases to which the Pullman and Western Union cases apply, where, from the actual nature of the business, it was found impracticable to separate the intrastate from the interstate business.

What we have here said with reference to our permit fee statute in the main applies with equal force to the franchise tax act. The tax is not laid on business which is commerce itself, because

the business of Crane Company is not itself commerce. The tax is not laid on the privilege of engaging in interstate commerce, for the courts have held that this statute does not apply to corporations engaged alone in interstate commerce. Allen vs. Jones Buggy Co., 91 Texas, 22; Gaar-Scott vs. Shannon, 223 U. S., 468. It is not a tax on property beyond the boundaries of the State, because it is not a property tax at all, but a privilege or franchise tax. The Texas courts have so classified this tax. Gaar-Scott vs. Shannon, 115 S. W., 363. Nor is this tax on receipts from interstate commerce as such. It is true that where a corporation has surplus or undivided profits these are considered along with the authorized capital in determining the amount of the franchise tax. The supplementary governing statute in regard to this matter is not shown in the pleadings nor in the opinion or judgment of the trial court, but through some oversight was omitted, although the same is published in appellee's brief. It is Chapter 153, page 137, General Laws of the Thirty-third Legislature. In Section 1 thereof it is declared:

"If the capital stock issued and outstanding plus the surplus and undivided profits shall exceed the authorized capital stock, the franchise tax shall be based on this amount instead of the authorized capital, but if it shall be less, then the franchise tax shall be based on the amount of capital stock, but no corporation shall be required to pay a greater rate of franchise tax by reason of its having a surplus than a corporation that has no surplus."

Surplus and undivided profits are evidently regarded as synonymous terms in this act, and for practical purposes they are so. State Life Insurance Co. vs. Spinks, 13 L. R. A., New Series, page 1053. Surplus means that which remains after the payment of expenses and dividends. Marks vs. American Brewing Co., 52 So., 985. In this statute the evident use of the surplus and undivided profits along with the authorized capital stock is to find a proper measure of the value of the franchise granted for the purpose of determining the tax. The tax is not on the receipts from interstate commerce, as such. The Legislature evi-

dently had in mind the practice of most successful business corporations of maintaining an operating surplus, and it probably believed that there was some reasonable relationship between the capital in use and the value of the privilege; that is, that the value of the privilege was reasonably connected with the capital in use.

The real question in every case is whether a measure of a legitimate tax has been adopted or whether a burden has been placed on interstate commerce or property beyond the boundaries of the State has been taxed. In this instance the tax does not necessarily fluctuate with the amount of interstate commerce, but only with the amount of surplus and undivided profits, regardless of the source, but which are substantially and in effect carried into the capital account, or, in case of loss, withdrawn therefrom. In considering this particular phase of the case, it appears to the writer that the real question is whether or not the franchise tax imposed is unduly great; that is, greater than the value of the privilege granted. If it is not so, then no burden is imposed, for the corporation receives equal value for its money. In the present case, Crane Company has a capital and surplus of $25,139,000 on which they are required to pay a franchise tax of $1,966 per year, or seventy-seven ten-thousandths of one per cent. It would take the payment of this tax for one hundred and twenty-seven years for the total sum paid to equal one per cent of Crane Company's capital and surplus. Can it be considered that a thing so insignificant is a property tax or a burden on interstate commerce? We think not; but that the method employed of ascertaining the amount of the tax is only a convenient way of measuring the privilege granted for the purpose of fixing the tax.

III.

The Validity of the Franchise Tax Statute if the Court Should Hold Any Part of the Same Invalid.

We do not apprehend any difficulty in sustaining our franchise tax act in so far as the tax is determined by reference alone to

the authorized capital stock of the corporation, but the real difficulty arises when the act requires the surplus and undivided profits to be also considered. We respectfully submit that the court can with propriety sustain the act in so far as it authorizes a consideration of the authorized capital stock with which to measure the tax, although it should hold that portion of the same void which requires a consideration of the surplus and undivided profits. Unless it is impossible to avoid it, a general revenue measure should never be declared inoperative in all its parts. Field vs. Clark, 143 U. S., 649 (696). "It is only when different clauses of an act are so dependent upon each other that it is evident the Legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause." Field vs. Clark, 143 U. S., 696; Huntington vs. Worthen, 120 U. S., 102. These same rules are observed by the Texas courts in determining the validity of Texas statutes. If a portion of a statute is repugnant to the fundamental law, but such invalid portion may be stricken out and that which remains be complete in itself and capable of being executed in accordance with the legislative intent, the remaining part must be sustained. Zwerneman vs. Von Rosenberg, 76 Texas, 522; State vs. Laredo Ice Co., 96 Texas, 461. If that portion of the statute requiring a consideration of the surplus and undivided profits be stricken out, there still remains the right to determine the tax by reference to the authorized capital stock, and it can hardly be contended that the Legislature would not have passed this act with this limited measure if it had thought this was necessary. In fact, as shown in the appendix, our franchise taxes have been determined with reference to the authorized capital stock since 1897, and the surplus and undivided profit feature was not incorporated in the law until 1905.

IV.

The Status of the Texas Laws in the Event the Permit Fee and Franchise Tax Laws, or Either of Them, Should be Void and the Right of Crane Company to an Injunction in Such Event.

This suit by Crane Company is predicated upon the proposition that it will not apply to the Secretary of State for a renewal of its permit, nor meet the conditions in the way of payment of fees necessary for such purpose, nor will it pay a franchise tax in compliance with the laws of the State. (Tr., p. 56.) We respectfully submit to the court that even though the court should find the present franchise tax act invalid, by reason of the reference there made to surplus and undivided profits, still this would not justify Crane Company in refusing to pay a legal franchise tax under any constitutional law of the State. If the present act is void, then, of course, we are carried back to that point in the legislative history of the State where there was a valid act on the subject, because a void law could not have the effect of repealing a valid one. The Act of 1897, page 168, fixes the franchise tax of foreign corporations without any reference to the surplus and undivided profits of corporations, but wholly with reference to the authorized capital. We respectfully submit that this act is a valid one, and Crane Company would not be entitled to an injunction upon their pleading, since by its terms they decline to comply with this or any other law of the State. In other words, if the act of the Legislature in effect when Crane Company brought this suit is invalid, then the preceding acts of the Legislature, of which such invalid act is an amendment, are valid, and Crane Company would not be entitled to an injunction under their pleadings, because of their refusal to comply with the valid laws of the State.

V.

The appellee in its brief has cited the case of Southern Railway Co. vs. Green, 216 U. S., 400, and we presume that the in-

sistence will be made that the doctrine of this case is applicable to Crane Company. We, therefore, desire to direct the court's attention to the fact that Crane Company came into the State with a limited license, or permit limiting its right to transact business in the State to ten years (Tr., p. 4); that at said time, and continuously since said date, the Constitution of the State of Texas, in Section 4, Article 8, expressly declares that the power to tax corporations and corporate property shall not be surrendered or suspended. This section reads as follows:

"The power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature, by any contract or grant to which the State shall be a party."

Under this constitutional provision the Texas courts have held that the fact that a foreign corporation has obtained a permit to do business in this State under an existing statute, and has paid the franchise tax required thereby, does not preclude the State from imposing a further franchise tax, and such change does not violate the constitutional provision prohibiting the impairment of contracts. (Gaar-Scott & Co. vs. Shannon, 115 S. W., 361.)

Moreover, when Crane Company obtained its original permit there was upon the statutes of this State a provision reserving to the Legislature the power to alter, reform or amend the charters of corporations. This provision was enacted in 1874, and has continuously been a part of the corporation laws of this State. It is now Article 1139 of the Revised Statutes, and reads:

"All charters or amendments to charters under the provisions of this chapter shall be subject to the power of the Legislature to alter, reform or amend the same."

The record in this case shows that Crane Company constructed a building on a lot purchased by it, all of the aggregate cost of $120,000. (Tr., p. 30.) The evidence likewise shows that this building was built for the purpose of handing goods in original packages and interstate commerce (Tr., p. 32), with which com-

merce, of course, its exclusion from the State for the doing of intrastate business would in no manner interfere. The evidence does not show that this building could not be sold for its original cost. Ludlow, appellee's manager, says that he doubts if the building and lot could be sold for its cost, still he admits that the building is located just off the heart of the city of Dallas, very close to the three most prominent hotels of the city and within the wholesale district. (Tr., p. 31.) He furthermore says: "I do not know that our people would sell that house and lot for $120,000 or $130,000; I do not know why they would. I think business property in Dallas has been selling for more than it is worth." (Tr., p. 34.)

It will be recalled, as we have heretofore shown, that the permit fee charged Crane Company is precisely the same as charter fees charged domestic corporations and that its franchise taxes are less than one-third of the franchise taxes of domestic corporations of the same size. There is, therefore, no question of discrimination against a foreign corporation having permanent property in the State, which was the issue in the Green case.

We respectfully submit, therefore, that the doctrine in the Green case does not apply and that none of the vested rights of Crane Company are violated by the amendments to the laws passed by the Legislature after its admission into the State.

VI.

Conclusion.

For the foregoing reasons, and also for the reasons set forth in our original brief heretofore filed in this cause, we respectfully pray the court for a reversal of the judgment of the district court of the United States for the Northern District of Texas, granting the temporary injunction against the appellant Ben F. Looney, Attorney General of the State of Texas; that said judgment grant-

ing said injunction be reversed and the order thereof vacated and annulled; and that this case be ordered dismissed.

BEN F. LOONEY,

Attorney General of the State of Texas, Appellant, for Himself.

C. M. CURETON,

Assistant Attorney General, of Counsel for Appellant, Ben F. Looney.

APPENDIX.

HISTORY OF PERMIT FEE AND FRANCHISE TAX STATUTES OF TEXAS.

PERMIT FEE STATUTE.

The Republic of Texas had no general system of corporation laws, nor did the State of Texas prior to the second day of December, 1871, but corporations were chartered by special act for various purposes. But so far as I have been able to find from a very careful investigation, and a more or less continuous handling of the subject of Texas corporations for many years, I have been able to discover nothing prior to the date named, nor for some time thereafter, relating to foreign corporations.

On the second day of December, 1871, the Legislature passed "An Act concerning Private Corporations," which is Chapter 80 of the Acts of the Twelfth Legislature of Texas. (See Gammel's Laws of Texas, Vol. 7, page 68.) This was a general corporation act in thirteen articles and eighty-two sections, setting forth in detail the method of creating and the laws governing domestic corporations, and became the basis of the general corporation statutes of the State. This corporation act was afterwards re-enacted in 1874 because of some defect in the enactment of the original measure, but no material changes were made in the statute. (Chapter 48, Acts of Fourteenth Legislature. See Gammel's Laws of Texas, Vol. 8, page 122.)

Neither of these acts contained any reference to foreign corporations, but related solely to domestic ones created under the laws of Texas.

Nor was any reference made to fees or taxes to be collected by the State; so I have concluded there were neither filing fees nor franchise taxes at that time. This conclusion is borne out by a note made by the codifiers of the Texas statutes of 1879, who, on

placing the corporation act above named in that codification of the laws, follow the same with a note calling attention to an act of the Legislature in 1879, fixing charter fees for domestic corporations. (Revised Statutes of Texas, 1879, page 97, note.) The first article, relating to fees to be paid by corporations created under the general corporation laws, was passed in 1883, and is Chapter 73 of Acts of the Eighteenth Legislature. (See Gammel's Laws of Texas, Vol. 9, page 378.) This act became the basis of our present statute fixing the filing and charter fees of domestic corporations, but it makes no reference whatever to foreign corporations or their admission into the State. That the court may see that it is, however, the foundation of our present Article 3837, of which our permit fee section for foreign corporations is a part, we quote the first section, as follows:

"Chapter LXXIII—An Act to fix the fees of the Department of State, and require the collection of the same.

"SECTION 1. Be it enacted by the Legislature of the State of Texas: That the Department of State shall charge and collect, for the use and benefit of the State, for services rendered in said Department, the following fees, towit: For each and every charter, amendment or supplement thereto of a private corporation created for the purpose of operating or constructing a railroad, magnetic telegraph line, or street railway, or express company, authorized or required by law to be recorded in said Department, a fee of one hundred dollars, to be paid when said charter is filed: provided, that if the authorized capital stock of said corporation shall exceed one hundred thousand dollars, it shall be required to pay an additional fee of twenty-five dollars for each one hundred thousand dollars authorized capital stock, or fractional part thereof, after the first; for each and every charter, amendment, or supplement thereto, of a private corporation intended for the support of public worship, any benevolent, charitable, educational, missionary, literary or scientific undertaking, the maintenance of a library, the promotion of painting, music or other fine arts, the encouragement of agriculture and horticulture, the maintenance of public parks, and facilities for skating and other innocent sports, and the maintenance of a public cemetery, a fee of ten dollars, to be paid when the charter is filed; for each and every

charter, amendment, or supplement thereto, of a private corporation, created for any other purpose, intended for mutual profit or benefit, a fee of twenty-five dollars shall be paid when the said charter is filed for record; provided, that if the authorized capital stock of said corporation shall exceed ten thousand dollars, it shall be required to pay an additional fee of five dollars for each additional ten thousand dollars of its authorized capital stock, or fractional part thereof, after the first; for each commission to every officer, elected or appointed in this State, a fee of one dollar; and each and every officer elected or appointed in this State is required to apply (for) and receive his commission; provided, that the Secretary of State shall not be required to forward copies of laws to, nor attest the authority of, any officer in this State who fails and refuses to take out his commission as required in this act: for every official certificate, a fee of one dollar of fine or forfeiture, one dollar; for copies of any paper, document or record in his office, for each one hundred words, fifteen cents." (Vol. 9. Gammel's Laws, page 378.)

Thus far we have seen that no reference has been made to the payment of franchise taxes, and as a matter of fact no laws to that effect had been enacted.

The first act of the Legislature relating to foreign corporations was that of 1887, which is Chapter 128, Acts of the Twentieth Legislature. (See Gammel's Laws of Texas, Vol. 9, page 914.) This act contained no reference to permit fees.

This act was amended and enlarged by the Act of 1889, which last named enactment became the basis of our present laws relating to the admission of foreign corporations. (See Revised Statutes, 1911, Articles 1314 to 1321, inclusive.) The Act of 1889 undertakes to furnish a complete code within itself for the admission of foreign corporations, and Section 5 of the act is the first mention in any Texas statute of a permit or admission fee for foreign corporations. It will be noted, too, that the subject of franchise taxes is not mentioned. The Act of 1889 reads as follows:

"Chapter 78 (S. B. No. 291). An Act to require foreign corporations to file their articles of incorporation with the Secre-

tary of State, and imposing certain conditions upon such corporations transacting business in this State, and to repeal an act approved April 2, 1887, entitled 'An Act to require foreign corporations to file their articles of incorporation with the Secretary of State, and imposing certain conditions upon such corporations transacting business in this State, and providing penalties for a violation of the same.'

"SECTION 1. Be it enacted by the Legislature of the State of Texas: That hereafter any corporation for pecuniary profit (except as hereinafter provided) organized or created under the laws of any other State, or of any territory of the United States, or any municipality of such State or territory, or of any foreign government, sovereignty, or municipality, desiring to transact business in this State, or solicit business in this State, or establish a general or special office in this State, shall be and the same are hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this State. If such corporation is created for more than one purpose the permit may be limited to one or more purposes.

"SEC. 2. All such corporations now transacting business in this State shall have four months from the date when this act takes effect to comply with the conditions hereof by filing their articles of incorporation as provided in Section 1 of this act.

"SEC. 3. Thereafter no such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed the corporation had filed its articles of incorporation under the provisions of this act in the office of the Secretary of State for the purpose of procuring its permit.

"SEC. 4. The provisions of this act shall not apply to corporations created for the purpose of constructing, building, operating, or maintaining any railway, or to such corporations as are required by law to procure permits to do business from the Commissioner of Agriculture, Insurance, Statistics and History.

"SEC. 5. Such corporation shall, if its capital stock be one hundred thousand dollars or less, pay a fee of twenty-five dollars to procure such permit; if its capital stock be more than one hundred thousand dollars, and less than five hundred thousand

dollars, it shall pay a fee of fifty dollars; if its capital stock be five hundred thousand dollars, and less than one million dollars, it shall pay a fee of one hundred dollars; if its capital stock exceed one million dollars, it shall pay a fee of two hundred dollars.

"SEC. 6. No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the Secretary of State.

"SEC. 7. Either the original permit or certified copies thereof by the Secretary of State shall be evidence of the compliance of (on) the part of any corporation with the terms of this act. A certificate of the Secretary of State to the effect that the corporation named therein has failed to file in his office the articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this act.

"SEC. 8. The Act of April 2, 1887, entitled 'An Act to require foreign corporations to file their articles of incorporation with the Secretary of State, and imposing certain conditions upon such corporations transacting business in the State, and providing penalties for a violation of the same,' be and the same is hereby repealed.

"SEC. 9. The near approach of the end of this session of the Legislature creates an imperative necessity that the rule requiring bills to be read on three several days be suspended, and it is so suspended."

(General Laws, Twenty-first Legislature, 1889, Chapter 77, pages 87 and 88.)

As suggested, Section 5 of the act above quoted required the payment of a permit fee.

This act of the Legislature became a part of the Civil Code in the codification of 1895, and was Chapter 17, Title 21, Revised Statutes of 1895 (Articles 745 to 749), except that Section 5 of the act, together with the Act of 1883, heretofore referred to, became a part of the Code of 1895, as Article 2439, Revised Statutes, 1895, which Article related to the fees generally to be collected by the Secretary of State, but made no reference to franchise taxes.

In 1897, Article 745, above referred to, relating to the admis-

sion of foreign corporations, was amended, but no reference was made to permit fees. (Chapter 119, Acts of 1897.)

The permit fee statute was not amended until 1905, when the amendment hereafter to be quoted was passed. At that time the statute read:

"Each foreign corporation shall pay fees as follows: If its capital stock be one hundred thousand dollars or less, a fee of twenty-five dollars to procure a permit; if its capital stock be more than one hundred thousand dollars, and less than five hundred thousand dollars, it shall pay a fee of fifty dollars; if its capital stock be five hundred thousand dollars, and less than one million dollars, it shall pay a fee of one hundred dollars; if its capital stock exceed one million dollars, it shall pay a fee of two hundred dollars." (Revised Statutes, 1895, Article 2439, p. 482.)

The quotation is merely that portion relating to foreign corporations, the article related to both foreign and domestic corporations, and other fees to be charged by the Secretary of State. That portion of the Act of 1905, which relates to the permit fee of foreign corporations, reads as follows:

"Section 1. * * * Each foreign corporation obtaining a permit to do business in this State shall pay fees as follows: If its authorized capital stock be ten thousand dollars or less, the fee for permit shall be twenty-five dollars; and if the authorized capital stock exceeds ten thousand dollars, the fee for permit shall be twenty-five dollars for the first ten thousand dollars of its authorized capital stock, and five dollars for each additional ten thousand dollars or fractional part thereof. All fees mentioned in this article shall be paid in advance into the office of the Secretary of State, and shall be by him paid into the State Treasury monthly.

"Section 2. The growing deficit in the State Treasury, and the fact that under existing law the filing fees charged for permits for foreign corporations are considerably less than those charged for charters of domestic corporations, making an unjust discrimination against domestic and in favor of foreign corporations, creates an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days.

and an emergency demanding that this act take effect and be in force from and after its passage, and it is so enacted." (Acts 29th Legislature, 1905, page 136.)

The effect of this act was to make the permit fee of foreign corporations exactly the same as the charter fees of domestic corporations, and this was one of its purposes as shown by the emergency clause quoted. The emergency clause also shows the State was in need of the money.

In 1907 the fee statute above referred to was again amended and the charter fees of domestic corporations as well as the permit fees of foreign corporations were each doubled, but the permit fees remained equal to and not in excess of the charter fees of domestic corporations. (Acts of 1907, Chapter 22, p. 500.)

In 1909 this article of the statutes (Revised Statutes, 1895, Article 2439), as previously amended, was again amended, but the amount of charter fees for domestic corporations and permit fees for foreign corporations, with certain exceptions, remained the same, and this act is the permit fee statute under attack in this case. (Acts 1909, First Called Session, Thirty-first Legislature, Chapter 4, p. 266.) A new and important feature of the Act of 1907, and the above amendment thereof of 1909, was the requirement of an anti-trust affidavit. This provision in the codification of 1911 became Article 1315.

Franchise Tax Statute.

The first franchise tax act of this State was passed in 1893, and became Chapter 102 of Acts of the Twenty-third Legislature. Section 1 of this act provided a gross receipts tax on insurance companies; Section 2 levied a tax on each telephone in use by any company within the State; Section 3 provided a tax on sleeping and dining car companies, and on persons or corporations leasing or renting cars to railroad companies in the State. Section 5 of the act provided a franchise tax of $10 on each domestic or foreign corporation doing business in the State. Sections 5, 6 and 7 of this act read:

"Section 5. That each and every private domestic corporation heretofore chartered or that may be hereafter chartered under the laws of this State, and each and every foreign corporation that has received or may hereafter receive a permit to do business under the laws of this State, in this State, shall pay to the Secretary of State, annually, on or before the first day of May, a franchise tax of ten dollars. Any such corporation which shall fail to pay the tax provided for in this article shall, because of such failure, forfeit their charter.

"Section 6. The Secretary of State shall, on or before the first day of March of each year, notify all corporations subject to the tax provided in the preceding section, and in thirty days after the first of May of each year shall publish a list of the charters forfeited for non-compliance with this act. Provided, that any corporation which shall within sixty days after such publication pay the tax and $5 additional thereto shall be relieved from forfeiture of its charter by reason of such failure. Provided further, that this act shall not be construed to repeal any law prescribing fees to be collected by the Secretary of State.

"Section 7. Corporations organized for the purpose of religious worship, or for holding places of burial, not for private profit, or for school purposes, or for purely public charity, are exempted from the tax imposed by this act."

(Acts 1893, Chapter 102, page 158.)

This act of the Legislature became Chapter 9 of Title 104 of the Revised Statutes of 1895, and formed the basis of the gross receipts and franchise tax laws of this State.

In 1897 this act was amended first by Chapter 104 of the acts of the Legislature of that year, and later by Chapter 120 of the acts of the same Legislature. The caption of said Chapter 104 indicates its purpose, and reads as follows:

"An Act to amend Article 5243e, 5243i, 5243j and 5243k of Chapter 9, Title 104, of the Revised Civil Statutes relating to the taxation of insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do business in this State for failure to pay the franchise tax levied

by this act, and to define and prescribe the notice to be given to said corporations previous to such forfeiture, and to provide adequate penalties for the violation of this act."

(Acts 1897, Chapter 104, page 140.)

Chapter 120 of the Acts of 1897 was an amendment of Chapter 104, just quoted from, and was:

"An Act to amend Articles 5243i, 5243j and 5243k of an act entitled 'An Act to amend Articles 5243e, 5243i, 5243j and 5243k, of Chapter 9, Title 104, of the Revised Civil Statutes, relating to the taxation of insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do business in this State for failure to pay the franchise tax levied by this act, and to define and prescribe the notice to be given to said corporations previous to such forfeiture, and to provide adequate penalties for a violation of this act,' passed at the present session and approved April 30, 1897."

(Acts 1897, Chapter 120, page 168.)

That portion of the same fixing the franchise taxes of domestic and foreign corporations reads as follows:

"Article 5243i. Each and every private domestic corporation heretofore chartered under the laws of this State shall pay to the Secretary of State an annual franchise tax of ten dollars on or before the first day of May of each year; and every such corporation which shall be hereafter chartered under the laws of this State shall also pay to the Secretary of State an annual franchise tax of ten dollars, the tax for the first year to be paid at the time such charter is filed, and the Secretary of State shall not be required or permitted to file such charter until such tax is paid, and each succeeding tax shall be paid on or before the first day of May of each year thereafter; provided, that any such corporation having an authorized capital stock of over fifty thousand dollars, and less than a hundred thousand dollars, shall pay an annual franchise tax of twenty dollars; and every such corporation having an authorized capital stock of one hundred thousand dollars and less than two hundred thousand dollars, shall pay an annual franchise tax of thirty dollars; and every such corporation having an authorized capital stock of two hundred

thousand dollars or more shall pay an annual franchise tax of fifty dollars. Each and every corporation heretofore authorized to do business in this State under the laws of this State shall, on or before the first day of May of each year, and each and every such corporation which shall hereafter be authorized to do business in this State shall, at the time so authorized, and on or before the first day of May of each year thereafter, pay to the Secretary of State the following franchise tax: Every such corporation having an authorized stock of twenty-five thousand dollars or less, an annual franchise tax of twenty-five dollars; every such corporation having an authorized capital stock of more than twenty-five thousand dollars and not exceeding one hundred thousand dollars, an annual franchise tax of one hundred dollars; every such corporation having an authorized capital stock of over one hundred thousand dollars, an annual franchise tax of one hundred dollars, and in addition thereto an annual franchise tax of one dollar for every ten thousand dollars of authorized capital stock over and above one hundred thousand dollars and not exceeding one million dollars; and if such authorized capital stock exceeds one million dollars, then such corporation shall pay a still further additional tax of one dollar for every one hundred thousand dollars over and above one million dollars. Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein shall, because of such failure, forfeit its right to do business in this State, which forfeiture shall be consummated, without judicial ascertainment, by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporations the word "Forfeited," giving the date of such forfeiture, and any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of this State, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such defendant corporation, unless its right to do business is revived as provided in Article 5243j of this act. All transportation companies now paying an annual income tax on their gross receipts in this State shall be exempted from the franchise tax above imposed."

(Acts 1897, Chapter 120.)

It will be noted that thus far in the history of this matter the

franchise taxes are determined by a reference to the *authorized* capital stock of the corporation, and no consideration is required of the *actual capital, surplus or profits.*

In 1905 the statutes as amended by the various acts we have referred to was again amended by Chapter 19 of the Acts of the Twenty-ninth Legislature, and that portion of the same fixing the franchise taxes to be paid domestic and foreign corporations was made to read as follows:

"Art. 5243i. Each and every private domestic corporation heretofore chartered, or that may hereafter be chartered, under the laws of this State, shall, on or before the first day of May of each year, pay to the Secretary of State the following franchise tax for the year following, towit: One dollar on each two thousand dollars or fractional part thereof, of the authorized capital stock of the corporation, up to and including one hundred thousand dollars, and one dollar on each ten thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars; and one dollar on each twenty thousand dollars or fractional part thereof of such stock in excess of one million dollars, and up to and including ten million dollars; and one dollar on each fifty thousand dollars or fractional part thereof of such stock in excess of ten million dollars; but such tax shall not be less than ten dollars in any case. And each and every foreign corporation heretofore authorized, or that may hereafter be authorized, to do business in this State, shall, on or before the first day of May of each year, pay to the Secretary of State the following franchise tax for the year following, towit: One dollar on each one thousand dollars or fractional part thereof of the authorized capital stock of the corporation up to and including one hundred thousand dollars; and one dollar on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars, and up to and including one million dollars; and one dollar on each twenty thousand dollars or fractional part thereof of such stock in excess of one million dollars, and up to and including ten million dollars; and one dollar on each fifty thousand dollars of such stock in excess of ten million dollars; but such tax shall not be less than twenty-five dollars in any case. Whenever a cor-

poration is chartered or authorized to do business in this State, it shall pay the proportional part of such annual franchise tax corresponding to the length of time before the next following first day of May, and if such tax be not then paid, so such charter shall be filed or permit issued. The franchise tax herein provided for shall be computed upon the basis of the total amount of the capital stock issued and outstanding, plus the surplus and undivided profits of the corporations, instead of upon the authorized capital stock, whenever such total amount is different from the authorized capital stock. Affidavit of the head of the corporation and secretary thereof to these facts may be filed with the Secretary of State, or may be required whenever in his judgment the same is necessary to protect the interests of the State. Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein shall immediately become liable to a penalty of twenty-five per cent on the amount of the tax due by it, and if the amount of said tax and penalty be not paid in full on or before the first day of July thereafter, such corporation shall, for such default, forfeit its right to do business in the State, which forfeiture shall be consummated without judicial ascertainment, by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporation the word "Forfeited," giving the date of such forfeiture; and any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of this State, and in any suit against such corporaion on a cause of action arising before such forfeiture, no affirmative relief may be granted to such corporation unless its right to do business is revived, as provided in Article 5243j. All insurance, surety, guaranty and fidelity companies, all transportation companies, and all sleeping, palace and dining car companies now paying an annual income tax on their gross receipts in this State shall be exempted from the franchise tax above imposed."

(Article 5243i as amended by Chapter 19, General Laws of the State of Texas, Regular Session of the Twenty-ninth Legislature, pp. 22 and 23.)

It is in this act that there appears for the first time in our

statutes any reference to the surplus and undivided profits of a corporation, in addition to its authorized capital, as a basis for determining the amount of its franchise tax. This feature of the act was further emphasized by Chapter 72 of the acts passed at the same session of the Legislature, wherein the method for calculating franchise taxes was prescribed in the following language, towit:

"Section 1. *Be it enacted by the Legislature of the State of Texas:* That the annual franchise tax, payable to the State by private domestic corporations heretofore chartered or that may hereafter be chartered under the laws of this State, and foreign corporations heretofore authorized or that may hereafter be authorized to do business in this State, shall be computed upon the basis of the authorized capital stock of the corporation, as stated in its articles of incorporation, or certified copy thereof, unless the aggregate amount of the capital stock issued, plus the surplus and undivided profits of the corporation, exceeds the authorized capital stock, in which case the franchise tax shall be computed upon the basis of such aggregate amount. For the purpose of making such computations, the Secretary of State is authorized to require affidavits of the president, secretary, treasurer and other officers of any such corporation to show the amount of its capital stock issued and its surplus and undivided profits, whether in his judgment the same may be necessary, or he may ascertain such facts from other sources. Should an officer of any corporation subject to the payment of an annual franchise tax fail or refuse to give under oath full and accurate information of the amount of the capital stock issued by the corporation, or of the amount of its surplus or undivided profits, when required so to do by the Secretary of State, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not more than five hundred dollars."

(Section 1, Chapter 72, General Laws of the State of Texas, Regular Session of the Twenty-ninth Legislature.)

This statute was again amended in 1907 by Chapter 23 of the Acts of the First Called Session of the Thirtieth Legislature, and that act, except in the particulars hereafter pointed out, constitutes the franchise tax law complained of by Crane Company in

this proceeding. It became Chapter 3, Title 126, Revised Statutes of 1911 of the State of Texas. This chapter relates to the franchise tax of domestic and foreign corporations, and may be found on pages 51 to 55, inclusive, of the Principal Corporation Laws of Texas, as compiled by the Secretary of State, and which we have filed in this cause for the convenience of the court. The Thirty-third Legislature, in 1913, passed an act supplementing the power given the Secretary of State in the chapter referred to and in Section 1 of this measure certain terms of Article 7394 were modified so that the franchise taxes to be paid when a corporation has surplus and undivided profits are calculated at the same rate as the taxes on those having only authorized capital stock. (Acts of Thirty-third Legislature, page 327, Section 1. Principal Corporation Laws of Texas, on file in this case, page 49.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 351. 16

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, APPELLANT.

VS.

CRANE COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF AND ARGUMENT FOR APPELLEE.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Appellee.

SUBJECT INDEX.

APPENDIX.

APPENDIX—(Continued.)

LIST OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 351.

BEN F. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, APPELLANT,

VS.

CRANE COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

Crane Company, the appellee, is an Illinois corporation. On the 6th day of November, 1914 appellee filed its bill against appellant as Attorney General of Texas and against one F. C. Weinert, then Secretary of State of Texas, praying that they be restrained from executing, as against the appellee, the provisions of the Texas statutes requiring and regulating the

issuance of permits to foreign corporations doing business there, and the statute exacting an annual tax which the legislation of the State of Texas denominates a franchise tax on foreign corporations doing business in Texas. The bases for the relief sought, as alleged in the bill and afterwards proved on the hearing, were the following facts:

The charter of appellee grants it power to enjoy and exercise all the powers incident or necessary to carry out and execute the business of manufacturing, merchandising, buying, selling and in every manner dealing in and with all kinds of steam, gas, water, oil, mine, mill, factory, engineer's, plumber's, railroad, hardware and builder's supplies and material, and agricultural machinery and supplies. (R. 2).

Appellee's authorized capital is $17,000,000, and its surplus and undivided profits are $8,129,000, and all of its property, wherever situated, does not exceed in value the amount of its capital, surplus and undivided profits. Under the laws attacked in the bill the appellee, if it complied with the Permit Statute, would be compelled to pay $17,040, and under the socalled Franchise Tax Act annually the further sum of $1,966. (R. 2).

Crane Company for twenty years past has been engaged in the business of shipping its goods, wares and merchandise from one State into another, including the State of Texas, for sale and delivery and for sale after delivery, selling its property through travelling salesmen who take orders there-

for and send the orders to its principal office at Chicago, and has received mail orders sent into its Chicago office by merchants in the State of Texas, for acceptance and shipment of goods to fill the orders, continuously during the said period of twenty years last past. Said company has been and is engaged in interstate commerce between Texas and other States of the Union, and is engaged in interstate commerce between each and every one of the States of the Union and the other States thereof and in foreign commerce, shipping goods for sale, or after they have been sold, from the United States into Canada and Mexico and other foreign countries. (R. 3).

All of the corporate business of Crane Company (as distinguished from its mercantile and manufacturing business) during the last twenty years has been, and is, conducted at its principal office in the city of Chicago. All of its executive officers maintain their offices in connection with Crane Company's business, at Chicago, and there transact all of the business which is transacted by the executive officers. The president, vice-presidents, secretary, assistant secretaries, treasurer and all assistant treasurers maintain their offices in Chicago, where the corporate meetings of Crane Company are held, where its stock book is kept in which all transfers of its capital stock are registered, and where the results of appellee's business everywhere are assembled into accounts, which are the only books of account that disclose all of Crane Company's business operations everywhere. (R. 3).

For the purpose of facilitating the transaction of its interstate and foreign business Crane Company has established agencies at the following places and during the year set opposite the name of each city respectively, to-wit:

Omaha	1886	Birmingham	1905
Kansas City	1887	Oklahoma City	1905
Los Angeles	1887	Boston	1906
Philadelphia	1890	Winnipeg	1906
San Francisco	1891	Tacoma	1906
Minneapolis	1892	Vancouver	1908
St. Paul	1893	Atlanta	1908
New York	1894	Newark	1908
Duluth	1894	Little Rock	1908
Portland, Ore.	1894	Wichita	1908
Sioux City	1897	Des Moines	1908
Oakland, Cal.	1898	Terre Haute	1909
Cincinnati	1899	Indianapolis	1909
St. Louis	1899	Washington	1909
Seattle	1902	Aberdeen	1910
Salt Lake City	1902	Sacramento	1910
Baltimore	1904	Great Falls, Mont.	1911
Fargo	1904	Knoxville	1911
Spokane, Wash.	1904	Detroit	1911
Dallas	1904	Davenport, Ia.	1912
Memphis	1904	Springfield, Mass.	1913
Muskogee	1909	Bridgeport, Conn.	1914

(R. 3-4).

After 1904, when the Dallas agency was established, the business transacted in Texas was, and continuously since has been, the importation into Texas and the sale there, or the importation and delivery there after sale elsewhere, of its

goods, and such other transactions as are incidental to the interstate business and so closely related thereto as that they, either in whole or in part, cannot be separated from the interstate commerce business of appellee without burdening such commerce and rendering the conduct thereof more expensive and less convenient. (R. 4).

On January 16th, 1905 appellee took out a permit under a law which permitted a foreign corporation with a capital stock in excess of one million dollars to secure a permit to do business in Texas by making application therefor, filing a copy of its charter and paying a fee of $200, the maximum fee required of any corporation for a permit. (R. 4).

In 1906, after it had secured such permit, for the purpose of transacting its interstate business as well as its incidental intrastate business, appellee purchased a lot for $30,000 and erected a five-story and basement warehouse thereon peculiarly adapted to the heavy class of goods which it handled and with the extraordinary strength required of such a building for appellee's use, at a cost of $91,520, which investment became permanent, because Crane Company could not hope to obtain a purchaser therefor at a price equal to the cost of the lot and the improvement on it. (R. 4-5).

Of its total capital, surplus and undivided profits of $25,139,000 only $301,179 is situate in Texas, viz: cash, $4,500; real estate, $121,520; furniture and fixtures, $11,882; and merchandise $163,277. (R. 5).

Appellee's gross receipts and gross sales are substantially identical, and for the year 1913 (the last year for which the total figures were available at the time the bill was filed) were $39,831,000, of which only those totalling $1,019,750 had any relation to the State of Texas. The balance of the total quantum of gross receipts and gross sales were the proceeds of goods sold and delivered in other states and countries than Texas without ever having come into Texas. The $1,019,750 of the gross sales which had relation to Texas arose in this way: Plaintiff received orders from customers in Texas at its Chicago house, forwarded by its Texas agency for direct shipment to various customers in Texas, from which it received $36,741. These goods were shipped directly to said customers. Appellee received orders at its Dallas agency for $80,011 in value of pipe, which it forwarded to a pipe company at Pittsburgh, Pennsylvania for direct shipment and which was shipped directly to the customers in Texas. Appellee received orders for $83,886 worth of goods at its Dallas agency, not of its own manufacture and not of pipe, from purchasers in Texas, which it ordered from divers factories and wholesale houses outside of Texas to be shipped direct to purchasers in Texas, and which were so shipped. And appellee's agency at Kansas City received orders from purchasers in Texas for $16,760 worth of goods, which it distributed from Kansas City to the purchasers in Texas. And appellee's Birmingham agency received orders for $11,210 worth of goods from purchasers in Texas, which were

shipped direct to such purchasers. Appellee received at its Chicago agency orders from customers in Texas, which did not come through the Dallas agency, for goods amounting to $142,000, which it shipped to the purchasers from Chicago. Appellee carried in its warehouse in Dallas a stock of goods in the year 1913, and continued to do so down to the time the bill was filed, consisting for the most part of original packages of goods which appellee had shipped into the state of Texas for sale to purchasers therein, and about seventy-five per centum of such goods were shipped out by appellee again from its warehouse to purchasers in unbroken packages. Appellee, during the year 1913, shipped from its Dallas and Texas City warehouses to persons in Texas $649,136 of goods, three-fourths of which, as aforesaid, were sold and delivered by appellee in the original packages in which appellee had brought the same into Texas. (R. 5-6).

Appellee, at the time the bill was filed, employed nine salesmen who traveled in the state of Texas, soliciting orders for the sale of its goods, each of whom solicited orders for goods to be shipped from its Chicago house and from the pipe company at Pittsburgh, Pennsylvania and from other factories and other wholesale houses located beyond the limits of the State of Texas, from whom appellee makes purchases. None of these traveling men take orders for other goods except those warehoused by appellee as aforesaid. Some orders come in to appellee by telephone and by telegraph and by Unitd States mail. (R. 6).

Unless its salesmen who travel in Texas can take orders for goods to be filled out of broken packages, appellee's interstate commerce business cannot be carried on to the same extent or in as large volume as appellee conducted it, nor at a reasonable profit. Appellee's business in broken packages in Texas would be insufficient to justify its establishment and maintenance of an agency at Dallas, for only approximately $162,284 of the total business of $1,019,750 of business done by appellee in Texas concerns goods sold in broken packages; whereas, $850,466 thereof concerns goods which either never came to appellee's warehouses in Texas or were sold from them in unbroken packages. (R. 6).

Aside from its nine traveling salesmen appellee employed in 1913 at its agency at Dallas and at its rented warehouse in Texas City forty employes, consisting of manager, bookkeeper, stenographer, shipping clerk, porters and teamsters. Its gross profits on its business incident to its agency at Dallas and its warehouse at Texas City, for the year 1913, were 20.13 per cent of its sales, and appellee realized a net profit, after charging 5 per cent on the investment, consisting of real estate, buildings and fixtures, of 5.18 per centum of its said sales, and realized, on the same basis, an average net profit of 4.475 per centum for the nine years preceding the filing of the bill. (R. 6).

Appellee paid in franchise taxes from 1904 to 1914 to the state $14,800, distributed as follows:

1904	$480
1905	730
1906	730
1907	730
1908	1506
1909	1600
1910	1642
1911	1776
1912	1776
1913	1882
1914	1948

In addition to which it paid annual advalorem taxes on all of its property situated in the State to the State and to the counties of Dallas and Galveston and to the city of Dallas. Said advalorem tax for the year 1913, the last year before the filing of the bill, amounted to $6,202.38. These taxes were laid on the value of appellee's real estate in Texas, its cash on hand there, its merchandise there and its furniture and fixtures there. These taxes are in addition to the permit tax of $200, paid when its permit was issued. The permit existing at the time the bill was filed expired by its limitation on January 15th, 1915. In the year 1907 the legislature of the state of Texas provided, as a condition precedent to obtaining a permit to do business in Texas, that each foreign corporation of the class to which appellee belongs, shall pay fees as follows:

$50 for the first ten thousand dollars of its authorized capital stock, and $10 for each additional ten thousand dollars,

or fractional part thereof, and requires that these fees must be paid in advance into the office of the Secretary of State before he can issue such permit. (R. S. of Texas, 1911, Arts. 3837 to 3840, Appendix page 40). (R. 7).

Building and loan companies have to pay a permit fee based only on the capital invested in the state. Corporations which pay gross receipts taxes pay only on the receipts from the business of the corporation in Texas. The Texas legislation in effect when the bill was filed and still in force also provides that a foreign corporation, such as appellee, desiring to transact business in the State shall file with the Secretary of State a duly certified copy of its articles of incorporation, thereupon the Secretary of State shall, upon the payment of the fees above referred to, and the franchise tax for the current year, issue to such corporations a permit to transact business in the state. The permit runs for ten years. As a further condition to the issuance of a permit by the Secretary of State to a foreign corporation such as appellee, the corporation is required to make an affidavit, through one of its officers, that it has not been a party to any agreement which would violate the antitrust laws of the State of Texas. The statutes of Texas also provide that no foreign corporation can maintain any suit or action, either at or law or in equity, in any of the courts of the State upon any demand, whether arising out of contract or tort, unless, at the time such con-

tract was made or tort committed, the corporation shall have filed its articles of incorporation in the office of the Secretary of State of Texas, under the provisions of the said laws, providing for a permit.

In the year 1907 the legislature of the State enacted that every foreign corporation of the class of appellee, authorized or that might thereafter be authorized to do business in the State, should, on or before the first day of May each year pay into the office of the Secretary of State a franchise tax for the following year, which should be computed as follows: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation, up to and including one hundred thousand dollars; and two dollars on each five thousand dollars, or fractional part thereof, of such stock in excess of one hundred thousand dollars and up to and including one million dollars; and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars and up to and including two million dollars; and two dollars on each fifty thousand dollars, or fractional part thereof, of such stock in excess of ten million dollars, *unless the total amount of the capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock*, and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars, or fractional part thereof, of the au-

thorized capital stock of such corporation issued and outstanding, plus the surplus and undivided profits, up to and including one hundred thousand dollars, or fractional part thereof, of such stock; and two dollars on each five thousand dollars, or fractional part thereof, of such stock or surplus and undivided profits in excess of one hundred thousand dollars and up to and including one million dollars; and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock or surplus and undivided profits in excess of one million dollars and up to and including two million dollars; and two dollars on each fifty thousand dollars of such stock or surplus and undivided profits in excess of ten million dollars. Provided that such franchise tax shall not, in any case, be less than Twenty-five dollars. (R. S. of Texas, 1911; Art. 7394; Appendix page 43). (R. 8-9).

The constitution of the State of Texas, prescribing the duties of the attorney general, reads thus:

> "He shall represent the State in all suits and bills in the Supreme Court of the State in which the State may be a party, and shall specially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be necessary and proper to prevent any private corporations from exercising any power or demanding or collecting any species of taxes to freight of wharfage not authorized by law. He shall, whenever sufficient cause exists, take a judicial forfeiture of such charters, unless otherwise expressly directed by law." (Appendix page 41).

Under this provision of the statutes the courts have held that it is the duty of the Attorney General to enjoin any foreign corporation transacting business in the State of Texas without first having taken out a permit under the law of 1907. (Western Union Telegraph Co. vs. State; 121 S. W. 195). Under the system of pretended laws relating to franchise taxes and permits of foreign corporations, when a permit to do business in the State is applied for, as well as in the month of January of each year, affidavits must be made by each foreign corporation as to the amount of its authorized capital stock, the amount thereof issued and outstanding and the amount of its surplus and of its undivided profits, and the Secretary of State must make an investigation sufficient to satisfy himself touching the amounts thereof, and the franchise tax is calculated either on the amount of the authorized capital stock or on the amount of the capital stock issued and outstanding plus the surplus and undivided profits, *as the same may be largest.* (R. S. of Texas; Art. 7396, 7397 and 7397a; Appendix pages 44-46). (R. 9). Failure to make these reports subjects the company to a fine of $10 for each and every day after the first day of February that it shall be in default, and the Attorney General is empowered and directed to bring suit in the name of the State for the collection of such penalties. (R. S. of Texas, 7397; Appendix page 45). Should the capital stock during the year be increased the corporation must pay in advance a supplemental franchise tax for the remainder of the year. (R. S. 1911, Art. 7398; Appendix,

page 48). Failure to pay the franchise tax at the time it becomes due subjects the foreign corporation to a penalty of twenty-five per centum of the amount of the franchise tax, and if the tax and penalty are not paid in full on or before the first day of July the corporation for the default forfeits its right to do business in the State, which forfeiture is consumated without judicial ascertainment by the Secretary of State entering upon the books kept in his office the words "Right to do business forfeited," and the date of such forfeiture. After forfeiture the corporation is denied the right to sue or defend in any courts of the state, except in a suit to forfeit the charter of the corporation. Neither can it receive any affirmative relief in a suit brought against it unless its right to do business has been revived, and every director and officer of the corporation who does business after the forfeiture becomes liable for its debts as though they were partners. (R. S. of Texas, 1911; Art. 7399; Appendix page 48). There is a provision for reviving the right to do business by paying the tax and the penalty within six months, together with an additional amount of five per centum of the tax for each month, or fraction thereof, elapsing after the forfeiture. (R. S. of Texas, 1911; Art. 7400; Appendix page 50). The law further provides that when a forfeiture of the permit occurs it shall be unlawful for any person who was a stockholder or official of the corporation at the time of the forfeiture, to do business in the State under the corporate name of the corporation, or to use signs or advertisements of such

corporation or similar to the signs or advertisements which were used by the corporation before forfeiture, and makes it a penal offense for such business to be done until the right has been revived. (R. S. of Texas, 1911; Art. 7402; Appendix page 53). The Attorney General is required to bring a suit for the franchise tax and penalties and to enjoin the further doing of business by the corporation. (R. S. of Texas; 1911; Art. 7403; Appendix page 53).

On November 6th, 1914, 95 per cent of all of the causes of action of Crane Company, arising from the sale of its goods, wares and merchandise in the State of Texas were below the minimum jurisdiction of the federal courts, so that the only courts open to appellee for the enforcement of such causes of action were the State courts, and appellee was liable, because of its business and transactions in Texas, to be sued in the state courts under such circumstances that it could not remove the suits to the federal courts. On the last named day appellee had determined not to take out a new permit upon the expiration of its then existing permit, nor to pay the franchise tax on May 1st, 1915, when its then existing franchise tax receipt expired. Under these circumstances and conditions appellee filed its bill on November 6th, 1914, based on the facts hereinbefore mentioned, setting them up and declaring that unless enjoined the then Secretary of State would undertake to forfeit on the books in his office the right of appellee to do business on or shortly after January 15th, 1915, and would bring this fact, as he was required to do by law, to the

attention of the appellee's debtors and to the notice of every person having claims against appellee, and would, when called upon by such persons, issue a certificate to that effect to such persons, whereby the courts of the State would be closed to the appellee, for such certificate is made under the laws of the State, conclusive evidence of the fact so certified; and that appellant, Ben F. Looney, as Attorney General, would institute suits to enforce said pretended laws by way of penalty for the failure to pay said franchise tax and for the purpose of ousting the appellee from doing business in Texas, each of said defendants conceiving it to be his duty so to do, as would be the case in the event said laws were constitutional; and in said bill the appellee averred that the effect of these acts would be to impede the appellee in the transaction of its interstate commerce business in the state of Texas and the local business inseparable therefrom and to deprive it of its right to do an interstate business and a business incident thereto in the State of Texas, in violation of the rights guaranteed to it under the constitution of the United States, in Art. 1, Sec. 8, Par. 4, and to deprive it of the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the federal constitution, and to deprive it of its property without due process of law, against which it is also protected by the Fourteenth Amendment to the constitution of the United States. (R. 10-11).

After the assembling of an appropriate court and notice to the defendants in the bill and to the Governor of the State,

an interlocutory injunction was granted against the Secretary of State and the Attorney General, from which the Attorney General has appealed, the then Secretary of State in the meantim having ceased to be such officer.

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ARGUMENT.

Appellee, upon constitutional grounds, assails the validity of Article 3837 of the Revised Statutes of Texas of 1911, exacting of it the payment of a fee of $17,040.00, for obtaining a permit to do business. It also assails the validity of Article 7394 exacting of it the payment of a socalled annual franchise tax of $1,966.00; and it seeks to restrain the appellant in his official capacity from attempting to visit upon it the ruinous consequences prescribed by the statute as the result of its refusal to yield obedience to the two threatened illegal exactions. The relief afforded by the injunctional order appealed from reflects the view of the lower tribunal that the acts assailed confiict with the Federal Constitution.

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IF SAID ARTICLES OF THE STATUTE, OR EITHER OF THEM, BE REPUGNANT TO THE RIGHTS OF APPELLEE AS GUARANTEED BY THE FEDERAL CONSTITUTION INJUNCTION IS THE APPROPRIATE REMEDY.

Ex Parte Young, 209 U. S. 123;
Western Union Tel. Co. vs. Andrews, 216 U. S. 165;
Ludwig vs. Western Union Tel. Co. 216 U. S. 146;
Meyer vs. Wells Fargo & Co., 223 U. S. 298;
Adams Express Co. vs. New York, 232 U. S. 14;
Platt vs. City of New York, 232 U. S. 35.

Article 3837 neither levies nor purports to levy a *tax*. It is the unmistakable imposition of a graduated *fee* upon appellee's entire authorized capital of $17,000,000.00 which necessarily represents all of its business and property both within and without the State. It operates as a tax upon property, 82/83 of which is permanently located and existing beyond the limits of the State, and upon a business of which 38/39 is transacted not only without the State but without any sort of relation to the State.

Such imposition constitutes a burden and a tax upon appellee's interstate business and operates a confiscation of its property in opposition to the interstate commerce and due process clauses of the Federal Constitution, and same is therefore void.

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Western Union Tel Co. vs. Kansas, 216 U. S. 1;
Pullman Co. vs. Kansas, 216 U. S. 56;
Ludwig vs. Western Union Tel. Co., 216 U. S. 146;
Western Union Tel. Co. vs. Andrews, 216 U. S. 165;
Southern Ry. Co. vs. Greene, 216 U. S. 400;
International Text Book Co. vs. Pigg, 217 U. S. 91;
A. T. & S. F. Ry. Co. vs. O'Connor, 223 U. S. 280;
Meyer vs. Wells Fargo & Co., 223 U. S. 298;
Buck Stove Co. vs. Bickers, 226 U. S. 205;
Williams vs. City of Talladega, 226 U. S. 404;
Adams Express Co. vs. New York, 232 U. S. 14;
Platt vs. City of New York, 232 U. S. 35;
Souix Remedy Co. vs. Cope, 235 U. S. 204;
Kansas City, Ft. Scott & Memphis Ry. Co. vs. Botkin, decided by this court February 21, 1916, not officially reported.

SIMILAR, BUT MUCH LESS DRASTIC, STATUTES OF KANSAS, ARKANSAS AND COLORADO HAVE BEEN HELD UNCONSTITUTIONAL BY THIS COURT.

The statute of Kansas which was held unconstitutional exacted a fee of $20,100.00 from the Western Union Telegraph Company upon its capitalization of $100,000,000.00, whereas the Texas statute exacts of appellee a *fee* of $17,040.00 on its capitalization of $17,000,000.00, which is but little more than one-sixth of that of the Western Union Telegraph Company. The Kansas statute exacted a fee of $14,800.00 from the Pullman Company on its capitalization of $74,000,000.00, whereas the Texas statute imposes upon appellee a fee of $2,200.00 in excess of that exacted by Kansas from the Pullman Company, and appellee's capitalization is less than one-fourth of that of the Pullman Company. The Kansas Statute exacted the payment of the fee but *once*, whereas the Texas Statute exacts it at least *every ten years*. It might exact it oftener, as the Texas statute provides that "no permit shall be issued for a longer period than ten years." Under the Kansas statute payment of the fee actually *authorized* the foreign corporation, without doing further, *to do business*.

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THE SUPREME COURT OF TEXAS HAS RECOGNIZED THE SUBSTANTIAL IDENTITY OF THE TEXAS PERMIT LAW AND THAT OF KANSAS ABOVE REFERRED TO, AND STRICKEN DOWN THE TEXAS ACT AS TO TELEGRAPH COMPANIES ON THE AUTHORITY OF WESTERN UNION VS. KANSAS 216, U. S. 1.

The memorandum, in the case referred to, Western Union Telegraph Company vs. The State, 126 S. W. R., 1197, is as follows:

> "Gaines, C. J. Since this suit was brought to this court, the Supreme Court of the United States in the case of Western Union Telegraph Company vs. State of Kansas, 216 U. S. 1, 30, Sup. Ct. 190, 54 L. Ed. 355, has ruled that a similar law of Kansas is unconstitutional. This renders unnecessary any discussion of the question involved in this suit. Upon the authority of the case cited, the judgments of the District Court and of the Court of Civil Appeals are reversed and judgment here rendered for the Western Union Telegraph Company."

The significance of this memorandum decision is twofold:

(a). It evinces the recognition by the highest judicial tribunal of Texas of an indistinguishable similarity of the Kansas statute to the legislation of Texas as the construction of the Texas statute by its court of last resort.

Any verbal or formal variances between the Kansas statute and the Texas statute are thereby shown to be merely such and not to import into the Texas law any element more favorable to the taxing power.

(b). This decision of the court of ultimate jurisdiction in Texas sharply pointed the law making power to the vice in the system of permit and franchise taxation in force in this State. So that since April 6, 1910, or for a period of more than six years during which there have been numerous sessions of the Legislature ample opportunity has been afforded the law making power to so reform these statutes as to eliminate the burdens imposed on interstate commerce and the taxation exacted on extraterritorial property.

We submit that properly considered, the case of Western Union Telegraph Company vs. The State, *supra*, as decided by the Texas Supreme Court, has material and cogent significance to the questions here involved.

The Colorado statute which was held unconstitutional exacted the payment of two cents upon each one thousand dollars of the capital stock, but upon the payment thereof the corporation, without doing further, could enter upon the transaction of business.

The Arkansas statute, known as the "Wingo Act," which was held unconstitutional exacted a graduated fee, but the payment thereof, without doing further, authorized the corporation to transact business.

THE TEXAS ACTS ARE MORE DRASTIC THAN THOSE HERETOFORE CONDEMNED BY THIS COURT.

The Texas statute, Article 3837, exacts of appellee the payment of a fee of $17,040.00 for what it is pleased to designate

a "permit to do business in this state," whereas such pretended permit *does not permit*, nor can a foreign corporation upon complying with that Act, without doing further, transact any business within the State. The fee exacted for obtaining a "permit to do business in this State" is deceptive because although a foreign corporation may pay for such permit, it cannot engage in business without subjecting its property and business to ruinous consequences and its stockholders, directors and officers to criminal liability. Such foreign corporation, although having yielded obedience to such illegal exaction, in order that it may transact business, *cannot transact business*, but must go further and yield obedience to the other illegal exaction imposed by Article 7394. No foreign corporation can do business in Texas by complying with Article 3837, because it does not stand alone, but is coupled with other onerous and burdensome conditions and exactions. No foreign corporation can transact business in Texas by complying with Article 7394, which exacts the payment of a socalled annual franchise tax, because as a condition precedent it must also pay the illegal exactions of Article 3837.

The fee of $17,040.00 exacted of appellee by Article 3837 cannot possibly be said to be a *tax* for the privilege of exercising its business in Texas, because the payment of the *fee* does not privilege appellee to do any business whatsoever in Texas. The exaction of $17,040.00 ostensibly for obtaining a "permit to do business," is in fact but a payment, as a con-

dition precedent, to the further payment of the socalled franchise tax exacted by Article 7394, and until both exactions have been complied with the corporation has not the right to transact any business in the State. A corporation may pay one or the other of the exactions imposed either by Article 3837, or by Article 7394, and yet should it refuse to pay both and proceed to the transaction of any business in the State it would be ousted from the State, and be denied the right to sue or defend in the courts of the State; it would be subjected to large penalties; its properties would be made the subject of confiscation, and its stockholders, directors and officers proceeded against as criminals.

This view of these two statutes is in nowise fanciful. It is a practical application of the statutes to every foreign corporation seeking to do business in Texas, excepts perhaps as to the chance and negligible few who may happen to qualify on the particular day of May first. This for the reason that under the law no matter when the permit is issued, the franchise tax must be paid to the first of May next succeeding. It can, therefore, rarely ever happen that a foreign corporation's permit and its franchise tax receipt expire simultaneously, and when they do *both* fee and tax must be paid again before business can be done.

In the case at bar, appellee's franchise tax, socalled, when the bill was filed had been paid to May 1, 1915, whereas its permit would expire on January 15, 1915. Notwithstanding

appellee's franchise tax had been paid to May 1, 1915, yet its right to transact any business in Texas would expire on January 15, 1915, and should it thereafter have transacted any business whatsoever in Texas it would but for the injunction appealed from have been ousted from the State, deprived of its right either to sue or to defend any suit except one brought to oust it, and in such suit an exhibition of its franchise tax receipt would afford it no immunity whatsoever. That such course in all probability would have been pursued, but for the relief herein afforded, is manifest from an inspection of Western Union Telegraph Co. vs. The State, 121 S. W. R., 195, wherein it is held that under the State Constitution the duty of brining such an ouster suit, in the supposed event, devolves upon the appellant, the Attorney General.

Is it then the payment of the *fee* of $17,040.00 that would authorize appellee to transact business in Texas? Not at all. Though it pay that fee yet it will not be entitled to transact business in the State. Is it then the payment of the $1,966.00 socalled annual franchise tax that authorizes the appellee to do business in the State? Not at all. Though it pay such franchise tax and obtain a receipt therefor yet it will not be entitled to transact any business in the State. It follows therefore, that in order to entitle a corporation to do any business in the State it must comply with both articles. It must pay the permit *fee* and it must pay the franchise tax. From this it follows that these two statutes are so related as that

if either the one or the other be invalid, both must fall. That Article 3837 is palpably violative of the Federal Constitution is not open to doubt. Three similar statutes, but of a much less malignant type, to-wit, those of Kansas, Arkansas, and Colorado, as we have shown have been stricken down because they had the effect not simply to exert the lawful power of taxing foreign corporations for the privilege of doing a local business, but to burden interstate commerce and to reach property represented by the capital stock which was duly paid in, and invested in property in many States other than in the one seeking to exact the *fee*. (231 U. S. 85). No case from this court has upheld any similar statute. We have cited the only cases from this court dealing with such statutes, and in every instance the statute has been condemned. The validity, therefore, of Article 3837 is not to our minds an open question.

It now remains to inquire as to the validity of Article 7394 which *purports* to exact the payment of an annual "franchise tax," but which is, in fact, as we insist, when considered either separately or in its necessary connection with Article 3837, an unlawful burden upon interstate commerce and a tax upon property permanently situate without the limits of the State.

DISTINCTIONS BETWEEN THIS CASE AND THE BALTIC MINING COMPANY CASE, 231, U S. 68.

The appellant, in this connection, relies upon the case of Baltic Mining Co. vs. Massachusetts, 231 U. S. 68, but,

in our judgment, that case is broadly distinguishable in its facts as well as in the essential difference between the statutes of Massachusetts and of Texas. The court there dealt only with an excise tax of $500.00 paid by the Baltic Mining Company and $200.00 paid by the White Dental Mfg. Co. The statute of Massachusetts imposing such excise tax stood alone. It did not require, as a condition precedent, the payment of any other *fee* whatsoever, much less a confiscatory fee such as is exacted by Article 3837 of the Texas statute. The court there dealt with a single statute. That statute imposed a moderate and reasonable excise tax, upon compliance with which a foreign corporation was *at liberty to transact business in the State*. Here the court has to deal not with one statute alone, but with two cognate statutes, the one exacting the payment of a *fee* of $17,040.00 for a permit, *which does not permit*, and the other exacting the payment of $1,966.00 for a license, *which does not license*. Justice Day, who wrote the opinion in the Baltic Mining Company case, concurred in the Kansas cases and in the later case he expressly said that there was no disposition to limit the authority of the Kansas cases. Manifestly, therefore, had the Massachusetts statute, which passed in review in that case, been coupled, as here, with another statute illegally exacting the payment of a large additional sum, *as a fee*, it would have been stricken down. It follows that Article 7394, taken in connection with Article 3837, is illegal and cannot stand, and it cannot be tested alone. It must be tested only in its inseparable con-

nection with Article 3837. The Court cannot reshape the statute because it would be a mere speculation whether the Legislature would have passed it in the new form. (223 U. S. 302). However, Article 7394, could it be considered apart from Article 3837, is unconstitutional, as applied to the particular facts of the instant case. Even so considered, it does not derive support from the Baltic Mining Company case as we shall now briefly point out.

The Baltic Mining Company *was not engaged in interstate commerce in Massachusetts.* It maintained its office in the City of Boston for the use of its president and treasurer residing therein, and for the general financial management and direction of its affairs, for the meetings of its board of directors, and for the transfer of its stock. What business it transacted was purely local, and it paid upon its capitalization of $2,500,000.00 an excise tax of $500.00, whereas, its assets amounted to more than four times its capital stock. The Baltic Mining Company's part of the case may, therefore, be dismissed without further comment, because obviously it sheds no light upon the question here.

The White Dental Mfg. Co. paid an excise tax of $200.00 upon its capitalization of $1,000,000.00, whereas its assets aggregated more than five times that amount. The White Dental Co. transacted one-tenth of all its business in Boston; whereas appellee transacts but 1/39 of all its business in Texas. The White Dental Co. did a purely local business

in Boston of fifty per cent. of all the business transacted by it in Massachusetts, or five per cent. of all the business transacted by it in the various States, whereas only ~~1/50~~ 1/5 of appellee's business in Texas constitutes local business, and such local business constitutes less than one-half of one per cent. of it entire business. The Massachusetts statute confined the excise tax to 1/50 of one per cent. of the authorized capital stock, whereas the Texas statute levies the tax upon the capital stock, surplus and undivided profits. The Massachusetts statute has a limitation of $2,000.00, whereas the Texas Statute has no limitation at all. The Dental Company paid $200.00, whereas appellee is asked to *first pay* $17,040.00, *as a prerequisite to paying* $1,966.00 annually. The Dental Company carried on a purely local and domestic business quite separate from its interstate transactions, whereas appellee is carrying on an inconsiderable local business, as incidental to and in aid of its interstate business from which it is inseparable without serious impairment of the interstate business.

The Massachusetts statute was upheld largely because of the construction put upon it by the Supreme Court of that State, and this construction was that the statute did not apply "to corporations whose business is interstate commerce, *or who carry on interstate and intrastate business in such close connection that the intrastate business can not be abondoned without serious impairment of the interstate business of the*

corporation." (231 U. S. 84). Under such construction appellee's Texas business, if transacted in Massachusetts would not be taxable there.

The Dental Company did not enter Massachusetts upon the State's invitation and expend money in the acquisition of valuable and permanent property, adapting same to its peculiar exigencies, whereas appellee's entered Texas at a time when the *maximum* permit fee was only $200.00, and acquired valuable real estate and at a large expense, erected thereon buildings so located and designed as to be adapted only for its special use, the sale of which now, for other uses, would result in a runious sacrifice. We contend, therefore, that even if Article 7394 stood alone it would necessarily operate an undue burden upon interstate commerce, an illegal taxation upon property permanently located without the State of Texas, and would thus offend against appellee's immunities under the organic law. In any event, Article 3837 constitutes an illegal exaction, is violative of the fundamental guaranties, and in consequence must be striken down, and as Article 7394 in inseparably connected with, and dependent upon, Article 3837, it, too, must fall.

NEITHER THE PERMIT FEE NOR THE FRANCHISE TAX IS A PRIVILEGE OR EXCISE TAX.

Article 7394 cannot be justified as an excise tax, constituting a license to do business, because it does not authorize the conduct of business, *except as the corporation may have*

previously paid or does simultaneously pay the illegal fee exacted by Article 3837. It is, therefore, beyond the power of definition to say that a tax is levied for the privilege of doing business when the payment of that tax *does not authorize the doing of business.* Likewise it is impossible to justify Article 3837 as an excise or license tax to do business, because a compliance with it *does not permit business.* Article 3837 is not even disguised. It does not even purport to levy a *tax.* Upon the contrary, in express terms, it exacts a *fee.* That fee is derived by computing a given per cent. upon all the corporation's capital (actual or potential) and property regardless of whether any portion of it be within the limits of the State.

THE STATE MAY IMPOSE A JUST AND REASONABLE EXCISE TAX ON APPELLEE WITHOUT CONFLICTING WITH THE CONSTITUTIONAL GUARANTIES AS DECLARED BY THIS COURT.

Appellee is not seeking to escape its just proportion of the burdens of Texas taxation in return for the privilege of transacting a local business in Texas, as incidental to and in aid of its interstate business. It only seeks to extricate itself from the toils of exactions palpably opposed to its fundamental rights as guaranteed by the organic law. It is within the power of the State to levy and collect a reasonable excise tax from a foreign corporation for the privilege of transacting a local business, but the State has not the right to say that a foreign corporation, as a condition precedent to say that a foreign corporation, as a condition precedent to its right to

transact any local business, shall pay a tax, fee, or other assessment, either upon its interstate commerce business, or upon its immense properties located wholly without the State.

Texas has no right to say to a foreign corporation, you may transact local business here *"if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the State."* (231 U. S. 83).

The State of Texas has not sought to impose, in good faith, a reasonable excise tax upon foreign corporations as the price of a privilege to transact local business within her borders. It may do so without *"the imposition of a tax which covers the entire operations of the company."* (216 U. S. 31).

THE NAME GIVEN TO THE TAX IS NOT CONCLUSIVE OF ITS NATURE AND EFFECT.

The State's disavowal of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. (216 U. S. 27). In determining this question the court will disregard mere forms of expression and go to the substance. The Texas Statute, no matter how disguised or phrased, is clearly the unlawful imposition of a tax upon all of the appellee's property and business; and this notwithstanding the fact that 38/39 of it is employed wholly

without the State. Appellee should not have been required to pay, on January 15, 1915, a *fee* of $17,040.00, constituting, as it does, an unlawful tax upon its business and property elsewhere; yet, unless it had done so, the Attorney General, but for the injunction would have instituted and maintained a disastrous suit against it. And on May 1, 1915, appellee would not have been permitted, even though it then offered, to pay the socalled annual franchise tax because of its refusal on January 15, to submit to the illegal exaction of $17,040.00, and thereupon a train of ruinous consequences would have ensued. Among them its right to do business would have ceased without judicial ascertainment to accomplish that result, but the magic words, "right to do business forfeited," would have operated to deprive appellee of the right to sue in any of the courts of Texas for any money that may be due and owing to it; and, what is perhaps more serious, appellee could be denied the right to defend any suit for money or property that may be instituted against it. Being denied the right to defend, it would be but an idle ceremony to serve it with summons, citation, or other notice, and any one, inclined so to do, by filing a petition in any court of the State against appellee, no matter how unfounded his alleged cause of action, could take judgment by default, and thereby appellee's property situated in Texas, of the value of $301,179.00, would become legitimate public prey. Its property would be confiscated and its stockholders, directors, and officers held liable as partners and unjustly branded as criminals. The penalties of outlawry would be visited on appellee and all who officer or serve it.

Appellee transacts business throughout the Union. It has established and maintains, additional to its home office in Chicago, forty-four agencies, and paraphrasing the pertinent language of Justice Harlan in Western Union Telegraph Co. vs. Kansas, 216 U. S. 37:

> It is easy to be seen that if every State should pass a statute similar to that enacted by Texas not only the freedom of interstate commerce would be destroyed, the decisions of the Supreme Court of the United States nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burden such commerce, but by taxation upon property situated beyond its limits.

CASES IN THIS COURT REPORTED SINCE THE INJUNCTION HEREIN WAS GRANTED.

The Arkansas statute, enacted after the decision of this court in Ludwig vs. Western Union Telegraph Company, 216 U. S., 146, came before this court in St. Louis, Southwestern Railway Company vs. Arkansas, 235 U. S., 350, and was sustained, because, as pointed out in the opinion, "this tax is measured by reference to property situate wholly within the confines of the state," and because, "property in a state, belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed or a tax may be imposed on the corporation on account of its property within the state, and may take the form of a tax for the privilege of exercising its franchises within the state,

if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction therefore not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." And this Arkansas tax is so enforcible. These incidence of the present Arkansas statute are absent from the Texas legislation, and no successful attempt has been made to amend the Texas laws to accord them with the decisions of this court in 216 U. S., on the former Kansas Act, nor with the decision of the Supreme Court of Texas in Western Union vs. The State, 126 S. W. Rep., 1197, declaring that the Texas legislation is indistinguishable from that of Kansas, condemned by this court.

The new Kansas Act of 1913, passed after the decisions of this court reported in 216 U. S., came before this court for examination in the case of Kansas City, Ft. Scott and Memphis Ry. Co. vs. J. T. Botkin, Secretary of State, decided February 21st, last, and not yet officially reported. This Act levied a franchise tax on a Kansas corporation graded according to the amount of its paid up capital stock, with a minimum limitation of $10 and a maximum limitation of $2500, which sum was reached at $5,000,000. This court sustained the act on the ground that it was in truth a tax on the privilege of being a corporation, which privilege was granted by the state of Kansas, because it appeared from the Act that

the reference for the amount of the tax to the amount of paid up capital stock was simply a matter of convenience, and that the limitation thereof showed that there was no intent to reach subjects withdrawn from the taxing authority. Contrasting this statute with the one under which the cases in 216 U. S., arose, this court said:

> "By the statute which was under review in Western Union Telegraph Co. vs. Kansas, *supra*, as was said in Flint vs. Stone Tracy Co., *supra*, summarizing that case—the State undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars on the Western Union Telegraph Company, a foreign corporation, and engaged in commerce among the States, as a condition of doing local business within the State of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid."

And the court also referred to the case of Baltic Mining Company vs. Massachusetts, *supra*, pointing out the limitation on the amount of the tax there, in this language:

> "And in the case of Baltic Mining Company vs. Massachusetts, *supra*, where a tax on foreign corporations was measured by the authorized capital stock and was limited to $2,000, the court also reached the conclusion 'that the authorized capital is only used as the measure of a tax,

in itself lawful, without the necessary effect of burdening interstate commerce,' and hence the legislation was within the authority of the State. It is true in that case it was pointed out that the taxing act did not apply to corporations engaged in railroad, telegraph, etc., business, or to those corporations whose business is interstate commerce; but it was also distinctly stated that the products of the corporations before the court were 'sold and shipped in interstate commerce,' and to that extent they were 'engaged in the business of carrying on interstate commerce' and were 'entitled to the protection of the Federal Constitution against laws burdening commerce of that character.' It was because the tax, although measured by authorized capital stock, could not in view of its limitation be regarded as imposing a direct burden upon interstate commerce that the tax was upheld. 231 U. S. pp. 86, 97."

The limitation of the tax, imposed by the New Kansas act coupled with the fact that the franchise being taxed was granted by the taxing State, saved the act. In the present case not only is all authorized capital stock, whether actually paid in or not, made the basis of the computation, but to insure that no property of the taxed corporation, wherever situate or however used, should be unaffected by the tax, the act provides that where there is a surplus or undivided profits, and these added to the amount of the paid up stock exceed the authorized capital, then the tax must be based on the amount of the capital paid in plus the surplus and undvided profits. And, while there is a limit downward, there is none upward and no provision of the act establishes a proportion between the tax and either the volume of business done in the state,

whether interstate or otherwise, or the amount of the authorized or paid in capital stock, surplus and profits used in the State, whether in interstate commerce or otherwise, or the amount of the capital stock, surplus or profits invested in property located within the State. The Texas statute, therefore, lacks all the features that this court has pointed out as constituting evidence on the face of the respective laws that they were enacted in the bona fide effort to levy a reasonably proportioned tax on either the business done or the capital invested or used in the taxing State.

THE CONSTITUTIONAL GUARANTIES OF THE COMMERCE CLAUSE AND THE FOURTEENTH AMENDMENT EXTEND TO FOREIGN CORPORATIONS ENGAGED IN THE SALE AND SHIPMENT OF PRODUCTS AND PROPERTY INTERSTATE.

That the protection afforded by the constitution of the United States against burdening interstate commerce is not confined to corporations engaged in railroad, telegraph and similar business of operating instrumentalities of interstate commerce, but enures as well to the benefit of corporations dealing in goods sold and shipped in interstate commerce and in that way engaged in good business which is interstate commerce, was pointed out in the case of Baltic Mining Co. vs. Massachusetts, 231 U. S. 68, and was applied in favor of a corporation selling goods in interstate commerce in the case of Sioux Remedy Company vs. Cope: 235 U. S., 197-204, where in this court said:

> "We think that when a corporation goes into a State other than that of its origin to collect, according to the

usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the State cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled." (Sioux Remedy Co. vs. Cope; 235 U. S., 204).

Capital is as necessary to interstate commerce as *instrumentalities* are. The reason *instrumentalities* of interstate commerce cannot be burdened is that to burden them is to burden the commerce by reaction. For a stronger reason the *capital* invested in the subject matter of such commerce and in the facilities of trade in such commodities between the different States should be protected against those burdens which are not permitted to be imposed upon such *instrumentalities*. While the instrumentality over on or in which the commerce moves is a necessary adjunct to trade, the capital invested in the subject matter thereof and used in the purchase, handling, accounting and collection is the very essence and substance of commerce and is the lifeblood of trade. The primary object of constitutional solicitude is that this fertilizing stream shall flow unobstructed by State lines.

There are two classes of tax cases in this court, germane to this question, the one class fairly represented by Western

Union Telegraph Company vs. Kansas, 216 U. S., 1 and The Pullman Co. vs. Kansas, 216 U. S., 56; and the other class represented by Baltic Mining Co. vs. Massachusetts, 231 U. S., 68, and Kansas City, Ft. Scott & Memphis Ry. Co. vs. Botkin, not yet officially reported; and, while every tax case rests upon its own facts, as this court has declared, yet an examination of the facts in this record will force this court to the conclusion reached by the Supreme Court of Texas, in the case of Western Union Telegraph Co. vs. The State, 126 S. W., 1197, that the Texas legislation cannot be distinguished from that of Kansas, as it existed prior to the amendments made to escape the violation of constitutional rights pointed out in the decisions reported in 216 U. S.

The necessary effect of the Texas legislation, raising an unlimited taxes graded on capital stock, surplus and undivided profits, without regard to their investment or use in the taxing State, denies to appellee the equal protection of the laws, and burdens the interstate commerce transacted by it.

Respectfully submitted,

FRANCIS MARION ETHERIDGE,

JOSEPH MANSON McCORMICK,

Solicitors for Crane Co., Appellee.

APPENDIX.

PROVISIONS OF THE CONSTITUTION AND LAWS OF TEXAS, RELATING TO PERMITS AND FRANCHISE TAXES OF FOREIGN CORPORATIONS.

Art. 3837. Fees of State Department. * * * * *

For each foreign corporation obtaining permit to do business in this state shall pay fees as follows: fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this state, shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, socalled, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each additional one hundred thousand dollars, or a fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the State of Texas. (Acts 1907, S. S., p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p. 87. Acts 1883, p. 72. Acts 1909, S. S., p. 267).

Art. 3840. Fees paid in advance to Secretary and by him to treasury monthly. All fees mentioned in articles 3837 and 3838 shall be paid in advance into the office of the Secretary of State, and shall be by him paid into the state treasury monthly. (Id).

CONSTITUTION OF THE STATE OF TEXAS.

Art. IV.

Sec. 22. The Attorney General shall hold his office for two years and until his successor is duly quailfied. He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power, or demanding or collecting any species of taxes, toll, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law. He shall reside at the seat of Government during his continuance in office. He shall receive for his services an annual salary of two thousand dollars, and no more, besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually.

CHAPTER THREE.

FRANCHISE TAX.

Art. 7393. Tax to be paid by domestic corporations.—Except as herein provided, each and every private domestic corporation heretofore chartered, or that may hereafter be chartered, under the laws of this State, shall on or before the first day of May of each year, pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows, viz: Fifty cents on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, unless the total amount of capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be fifty cents on each one thousand dollars of capital stock of such corporations issued and outstanding, plus its surplus and undivided profits; provided, that such franchise tax shall not in any case be less than ten dollars; provided, that, where the authorized capital exceeds one million dollars, such franchise tax shall be fifty cents for each one thousand dollars up to and including one million dollars, and for each additional one thousand dollars, in excess of one million dollars, it shall be twenty-five cents. (Acts 1907, p. 503, Sec. 1).

Art. 7394. Tax to be paid by foreign corporations.—Except as herein provided, each and every foreign corporation, authorized, or that may hereafter be authorized to do business in this State, shall on or before the first day of May of each year, pay in advance to the Secretary of State a franchise tax for the year following, which shall be computed as follows, viz: One Dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof of such stock in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on each five thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars,

and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten million dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars. (Acts 1907, p. 503; Sec. 2).

Art. 7395. Only part of tax to be paid, when.—Whenever a private domestic corporation is chartered in this State, and whenever a foreign corporation is authorized to do business in this State, and such corporation shall be required to pay in advance to the Secretary of State, as its franchise tax from that time down to and including the thirtieth day of April next following, only such proportionate part of its annual franchise tax, as hereinabove prescribed, as the period of time between the date of filing of its articles of incorporation or the issuance of its permit to do business, as the case may be, and on the first day of May next following, bears to a calendar year. (Acts 1907, p. 503; Sec. 3).

Art. 7396. Certain affidavits may be required.—For the purpose of determining the amount of the first franchise tax payment required by this chapter of any domestic corporation, which may be hereafter chartered, or of any foreign corporation which may hereafter apply for a permit to do business within this State, and also for the purpose of determining

the correctness of any report which is provided for in this chapter, the Secretary of State may, whenever he may deem it necessary or proper to protect the interest of the State, require any one or more of the officers of such corporations to make and file in the office of the Secretary of State an affidavit or affidavits in writing, which shall be subscribed by such officer, and by him sworn to before some officer who is by law duly authorized to administer oaths, and verified by his seal of office, setting forth fully the facts concerning the amount of the surplus and undivided profits, respectively, if any, of such domestic or foreign corporation; and until the Secretary of State shall be fully satisfied as to the amount of such surplus and undivided profits, respectively, if any, he shall not file the articles of incorporation of such proposed domestic corporation, or issue such permit, or accept such franchise tax. (Acts 1907, p. 503; Sec. 4).

Art. 7397. Reports to be filed, etc.—For the purpose of ascertaining and determining the amount of any annual franchise tax prescribed by this chapter, excepting only the first tax to be paid by any domestic corporation, which may hereafter be chartered, or of any foreign corporation which may hereafter be authorized to do business in this State, the President, Vice-president, General Manager, Secretary, Treasurer and Superintendent of each and every domestic or foreign corporation embraced within the provisions of the chapter, shall annually and between the first and tenth days of March, and also whenever called upon by the Secretary of State to do so,

report to the Secretary of State, in writing, and under oath, as required by the preceding article, the total amounts of the capital stock issued and outstanding, and the surplus and undivided profits, respectively, if any, of such corporation on the first day of March next preceding; and the Secretary of State may ascertain such facts from other sources; and, if the true aggregate of such amounts shall exceed the authorized capital stock of such corporation as disclosed by its then current original or amended articles of incorporation, the amount of its annual franchise tax for the year beginning the first day of May next thereafter shall be thereon collected and paid; otherwise, its annual franchise tax shall be calculated and paid upon the amount of its authorized capital stock as shown by its aforesaid original or amended articles of incorporation. The making and filing by any one of such officers of such corporation of the record required by this article shall relieve the other officers of such corporation from the duty of making any report required by this article, except such report or reports as may be required by the Secretary of State. (Acts 1907, p. 503; Sec. 5).

Art. 7397a. Reports to be filed; basis of tax.—All corporations that are now required by law to pay an annual franchise tax, shall, between the first day of January and the first day of February of each and every year, be required to make a report to the Secretary of State, on blanks furnished by him, which report shall give the authorized capital stock of the corporation, the capital stock issued and outstanding,

the surplus and undivided profits of the corporation, the names and addresses of all the officers and directors of the corporation, the amount of mortgages, bonded or other indebtedness of each corporation, and the amount of the last annual, semi-annual or quarterly dividend. If the capital stock issued and outstanding plus the surplus and undivided profits shall exceed the authorized capital stock, the franchise tax shall be based on this amount instead of the authorized capital, but if it shall be less, then the franchise tax shall be based on the amount of capital stock, but no corporation shall be required to pay a greater rate of franchise tax by reason of its having a surplus than a corporation that has no surplus. (Acts 1913, p. 327; Sec. 1).

Art. 7397b. Penalty for failure to make report, etc.—Any corporation which shall fail or refuse to make the report as provided in section one hereof (Art. 7397a), shall be subject to a fine of ten dollars for each and every day after the first day of February that they shall fail to make such report. The Attorney General of this State is hereby empowered and directed to bring suit against such corporation in either of the district courts of Travis county, in the name of the State of Texas for the collection of such penalties that may be due by reason of such failure. (Acts 1913, p. 327; Sec. 2).

Art. 7397c. Reports privileged, etc.—The reports required by this Act shall be deemed to be privileged and not for the inspection of the general public, but any party or

parties who are interested in the subject matter of any report, may, upon valid request in writing made to the Secretary of State, secure a copy of same. (Acts 1913, p. 327; Sec. 3).

Art. 7397d. May be made by what officers; how executed, etc.—The following officers of each and every corporation shall be deemed competent to make the report required by this Act: The President, Vice-president, Secretary, Treasurer or General Manager, and all reports provided for in this Act shall be signed officially and sworn to before some officer authorized by law to administer oaths. (Acts 1913, p. 327; Sec. 4).

Art. 7397e. Laws repealed, etc.—All laws and parts of laws in conflict with this Act are hereby repealed, but where this Act is not in conflict with any existing law, it shall be held to be amendatory thereof. (Acts 1913, p. 327; Sec. 5).

Art. 7398. Supplemental tax to be paid when capital increased.—In the event of increase in the authorized capital stock of any domestic or foreign corporation, it shall also pay in advance a supplemental franchise tax thereon for the remainder of the year down to and including the thirtieth day of April next thereafter, the amount of which shall be determined as is provided in article 7395 in case of the first franchise tax payment to be made under this chapter by a domestic corporation which may be hereafter authorized to do business within this State. Acts 1907, p. 503; Sec. 6).

Art. 7399. Failure to pay tax; charter forfeited, when; penalty.—Any corporation, either domestic or foreign, which

shall fail to pay any franchise tax provided for in this chapter when the same shall become due and payable under the provisions of this chapter, shall thereupon become liable to a penalty of twenty-five per cent of the amount of such franchise tax due by such corporation; and, if the amount of such tax and penalty be not paid in full on or before the first day of July thereafter, such corporation shall for such default forfeit its right to do business in this State; which forfeiture shall be consummated without judicial ascertainment by the Secretary of State entering upon the margin of the record kept in his office relating to such corporation, the words, "right to do business forfeited," and the date of such forfeiture; and any corporation whose right to do business shall be thus forfeited shall be denied the right to sue or defend in any other courts of this State, except in a suit to forfeit the charter of such corporation; and, in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief shall be granted to such corporation, unless its right to do business in this State shall be revived as provided by this chapter. And each and every director and officer of any corporation whose right to do business within this State shall be so forfeited shall, as to any and all debts of such corporation which may be created or incurred, with his knowledge, approval and consent, within this State, after such forfeiture by any such director or officers, and before the revival of the right of such corporation to do business, be deemed and held liable thereon in the same man-

ner and to the same extent as if such directors and officers of such corporation were partners. Acts 1907, p. 503; Sec. 8).

Art. 7400. Notice of forfeiture. The Secretary of State shall, during the month of May of each year, notify each domestic and foreign corporation which may be or become subject to a franchise tax under any law of this State, which has failed to pay such franchise tax on or before the first day of May, that unless such overdue tax together with said penalty thereon shall be paid on or before the first day of July next following, the right of such corporation to do business in this State will be forfeited without judicial ascertainment. Such notice may be either written or printed and shall be verified by the seal of this office of the Secretary of State, and shall be addressed to such corporation and mailed to the postoffice named in its articles of incorporation as its principal place of business, or to any other known place of business of such corporation; and a record of the date of mailing such notice shall be kept by the Secretary of State. Such notice and said record thereof shall constitute legal and sufficient notice thereof for all the purposes of this chapter. Any corporation whose right to do business may have been forfeited, as provided in this chapter, shall be relieved from such forfeiture by paying the Secretary of State any time within six months after such forfeiture the full amount of the franchise tax and penalty due by it, together with an additional amount of five per cent of such tax for each month, or fractional part of a month, which shall elapse after such forfeiture; provided, that such amount

shall in no case be less than five dollars. When such tax and all such penalties shall be fully paid to the Secretary of State, he shall revive and reinstate the right of the corporation to do business within this State by cancelling the words, "right to do business forfeited," upon his record and endorsing thereon the word, "revived," and the date of such revival. If any domestic corporation whose right to do business within this State shall hereafter be forfeited under the provisions of this chapter, shall fail to pay the Secretary of State, on or before the first day of January next following the revival, amounts necessary to entitle it to have its right to do business revived under the provisions of this chapter, such failure shall constitute sufficient grounds for the forfeiture, by judgment of any court of competent jurisdiction, of the charter of such domestic corporation. (Acts 1907, p. 503; Sec. 9).

Art. 7400a. Cancellation of forfeiture in certain cases; forfeiture by judgment, when, etc.—Every private corporation heretofore chartered under the laws of this State, whose charter or right to do business, and every foreign corporation whose right to do business within this State has heretofore been forfeited as provided by law, solely and only because of its failure to pay, within the time provided by law any franchise tax or taxes and penalty or penalties prescribed by law for failure to pay such tax or taxes when due, shall be permitted and authorized to pay to the Secretary of the State on or before the first day of September, A. D., 1913, the aggregate amount of its franchise tax or taxes and the penalty or

penalties thereon as provided by law, calculated for the entire period of time beginning with the day upon which the first unpaid franchise tax payment became due and ending with the day of such payment; and upon such payment being made to the Secretary of State, he shall cancel such previous forfeiture of the right of such corporation to do business within this State and shall endorse the margin of the record kept in his office relating to such corporation the word "Revived," and the date of such revival. Failure of any such domestic corporation to pay such aggregate amount on or before the first day of September, A. D., 1913, shall constitute sufficient grounds for the forfeiture by a judgment of any court of competent jurisdiction of the charter of such domestic corporations; provided; that none of the provisions of this section shall apply to any corporation whose right to do business within this State, or whose charter may have been legally forfeited for any other reason than that of failure to pay such franchise tax or taxes and such penalty or penalties.

Provided that this Act shall not in any manner affect any litigation by or against any corporation which cause of action or defense to any cause of action originated since the forfeiture of the charter or cancellation or permit and prior to the time of taking advantage of this Act. (Acts 1907 (1st. Ex. Sess.) Ch. 23, Sec. 10. Amended Acts 1911, p. 91, Sec. 1. Acts 1913, p. 334; Sec. 1).

Art. 7401. Foreign corporations may withdraw.—Should any foreign corporation which may have or hereafter obtain

a permit to do business within this State desire at any time to withdraw from doing business in this State, it may surrender such permit to the Secretary of State, who shall thereupon mark or stamp such permit, "surrendered," dating and signing same officially, and shall endorse upon the record of such permit in his office the word, "surrendered," and the date thereof; and thereafter such corporation may, by complying with the provisions of this chapter, secure a new permit to do business in this State without having made any further payment of franchise tax under such old permit. (Acts 1907, p. 503, Sec. 11).

Art. 7402. No business to be done after forfeiture; penalty.—In any and all cases in which the charter, or right to do business, of any private domestic corporation, heretofore or hereafter chartered under the laws of this State, or the permit of any foreign corporation, or its right to do business within this State, shall have been or shall hereafter be forfeited, it shall be unlawful for any person or persons who were or shall be stockholders, or officers, of such corporation at the time of such forfeiture to do business within this State, in or under the corporate name of such corporation, or to use signs or advertisements of such corporation or similar to the signs or advertisements which were used by such corporation before such forfeiture; and each and every person who may violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished as provided in the Penal Code; provided, the inhi-

bition and penalties prescribed by this article shall not apply where the right of such corporation to do business within this State has been revived in the manner provided by law and is at the time in good standing. (Acts 1907, p. 503; Sec. 12).

Art. 7403. Certain corporations not required to pay tax, when.—The franchise tax imposed by this chapter shall not apply to any insurance company, surety, guaranty or fidelity company, or any transportation company, or any sleeping, palace car and dining car company which now is required to pay an annual tax measured by their gross receipts, or to corporations having no capital stock and organized for the exclusive purpose of promoting the public interest of any city or town, or to corporations organized for the purpose of religious worship, or for providing places of burial not for private profit, or corporations organized for the purpose of holding agricultural fairs and encouraging agricultural pursuits, or for strictly educational purposes, or for purely public charity. (Acts 1907, p. 503; Sec. 13).

Art. 7404. Attorney General to bring suit, when.—The Attorney General shall be authorized, and it shall be his duty, to bring suit therefor against any and all such corporations which may be or become subject to or liable for any and all franchise tax or taxes or penalites under this or any former law; and, in case there may now be or shall hereafter exist valid grounds for the forfeiture of the charter of any domestic private corporation, or failure to pay any franchise tax or franchise taxes or penalty or penalties to which it may have

become or shall hereafter be or become subject or liable under this or former law, it shall be his duty to bring suit for a forfeiture of such charter; and, for the purpose of enforcing the provisions of this chapter by civil suits, venue is hereby conferred upon the courts of Travis County concurrently with the courts of the county in which the principal office of such corporation may be located as shown by its articles or amended article of incorporation. Such courts shall also have authority to restrain and enjoin a violation of any and all of the provisions of this chapter. In any and all cases in which any court having jurisdiction thereof shall make and enter judgment forfeiting the charter of any such corporation, the court may appoint a receiver thereof and may administer such receivership under the laws regulating receiverships. (Acts 1907, p. 503; Sec. 14).

Art. 7405. Forfeiture of charter by court; duty of clerk.—Upon the rendition by the District Court of any judgment or forfeiture under the provisions of this chapter, the clerk of that court shall forthwith mail to the Secretary of State a certified copy of such judgment; and, upon receipt thereof, he shall endorse upon the record of such charter in his office the words, "judgment of forfeiture," and the date of such judgment. In event of an appeal from such judgment by writ of error or otherwise, the clerk of the court from which such appeal is taken shall forthwith certify to the Secretary of State the fact that such appeal has been perfected, and he shall endorse upon the record of such charter in his office the

word, "appealed," and the date upon which such appeal was perfected. When final disposition of such appeal shall be made, the clerk of the court making such disposition thereof shall forthwith certify such disposition and the date thereof to the Secretary of State, who shall briefly note same upon the record of such charter in his office and the date of such final disposition. Acts 1907, p. 503; Sec. 15).

Art. 7406. Payment of tax by corporation in process of liquidation.—In case a corporation is actually in process of liquidation, such corporation shall only be required to pay a franchise tax calculated upon the difference between the amount of stock actually issued and the amount of liquidating dividends actually paid upon such stock; provided, that the President and Secretary of such corporation shall make affidavit as to the total amount of capital stock issued and as to the amount of liquidating dividends actually paid and that such corporations is in an actual bona fide state of liquidation. (Acts 1907, p. 503; Sec. 15a).

PENAL CODE.

Art. 148. Persons or corporations liable for franchise tax failing to make report.—Every person required by the law prescribing franchise taxes to be paid by corporations to make any annual report to the Secretary of State, who shall, for a longer period than five days, and every person who shall, for more than ten days after the mailing by the Secretary of State demand upon him for any other report, which the Secre-

tory of State is by this law authorized to require, fail or refuse to make such report, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty dollars and not more than two hundred dollars; and each day of such failure or refusal after the expiration of said five days or said ten days, as the case may be, shall constitute a separate offense. The Secretary of State shall keep a record of the mailing of any and all notices and demands for reports provided for by this law.

PENAL CODE.

Art. 149. Charter or right to do business of corporations forfeited, right of officers to do business in corporate name ceases.—In any and all cases in which the charter or right to do business of any private domestic corporation, heretofore or hereafter chartered under the laws of this State, or the permit of any foreign corporation or its right to do business within this State, shall have been, or shall hereafter be, forfeited, it shall be unlawful for any person or persons who were or shall be stockholders, or officers of such corporation at the time of such forfeiture to do business within this State in or under the corporate name of such corporation, or to use signs or advertisements of such corporation or similar to the signs or advertisements which were used by such corporation before such forfeiture; and each and every person who may violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall

be fined in any sum not less than one hundred dollars and not more than one thousand dollars; provided, the inhibition and penalties prescribed by this article shall not apply where the right of such corporation to do business within this State has been revived in the manner provided by law and is at the time in good standing.

PENAL CODE.

Art. 1487. When charter or permit of corporation forfeited, members or officers of such corporation prohibited from using old corporate name.—When any charter or permit, heretofore or hereafter granted under the laws of the State of Texas to any corporation to do business in said State, shall have been forfeited, it shall be unlawful for any persons who were members or officers of said defunct corporation at the time of such forfeiture, to do business in Texas under the old corporate name of such corporation, or to use the same or like signs or advertisements which were used by such corporation before such forfeiture; and any such person, so violating this law, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not more than one thousand dollars, nor less than two hundred and fifty dollars; provided, this shall not apply where the charter of a corporation has been revived in the manner provided by law, and is at the time in good standing. (Acts 1907, p. 34; Sec. 4; Acts 1905, p. 335).

ACT OF APRIL 3, 1889.

* * * * * Sec. 5. Such corporation shall, if its capital stock be one hundred thousand dollars or less, pay a fee of twenty-five dollars to procure such permit; if its capital stock be more than one hundred thousand dollars, and less than five hundred thousand dollars, it shall pay a fee of fifty dollars; if its capital stock be five hundred thousand dollars, and less than one million dollars, it shall pay a fee of one hundred dollars; if its capital stock exceed one million dollars, it shall pay a fee of two hundred dollars.

Sec. 6. No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the Secretary of State.

Sec. 7. Either the original permit or certified copies thereof by the Secretary of State shall be evidence of the compliance of (on) the part of any corporation with the terms of this act. A certificate of the Secretary of State to the effect that the corporation named therein has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this act. (Gammel's Laws of Texas, Vol. 9, page 1116).

ACT OF APRIL 14, 1905.

* * * * * Each foreign corporation obtaining a permit to do business in this State shall pay fees as follows: If its

authorized capital stock be ten thousand dollars or less, the fee for permit shall be twenty-five dollars; and if the authorized capital stock exceeds ten thousand dollars, the fee for permit shall be twenty-five dollars for the first ten thousand dollars of its authorized capital stock, and five dollars for each additional ten thousand dollars or fractional part thereof. All fees mentioned in this article shall be paid in advance into the office of the Secretary of State, and shall be by him paid into the State Treasury monthly. (General Laws of Texas, 29th Legislature, Chapter 91, Section 1. Gammel's Laws of Texas, Vol. 12).

ABSTRACT OF GROSS RECEIPTS TAX. LAW.

These Articles of the Rev. Stat. of Texas of 1911 were in effect when the bill was filed and still in force.

Article 7369 provides for a gross receipt tax on express companies "equal to two and one-half per cent of" the amount of *gross receipts from charges and freight within this state.*

Article 7370 provides for a gross receipts tax from telegraph companies "equal to two and three-fourths per cent of" the gross amount received from *all business within this State.*

Article 7371 provides for a gross receipts tax on gas, electric lights, power or waterworks corporations "equal to one-fourth of one per cent of" the gross amount received from *the business done within this State* in the payment of charges for electric lights, gas, electric power or water.

Article 7372 provides for a gross receipts tax on collecting or commercial agencies "equal to one-half of one per cent of" the gross amount received in the payment of *charges for collections made and business done within this State.*

Article 7373 provides for a gross receipts tax on car companies "equal to three per cent of" the gross receipts of the company of revenue received *from business done within this State.*

Article 7374 provides for a gross receipts tax on pipe line companies "equal to two per cent of" its gross receipts of its pipe lines *lying wholly within this State,* and such proportion of two per cent of the gross receipts of pipe lines *lying partly within this State* as the length of the *line within the State* bears to the whole length thereof, with a proviso that the Comptroller of Public Accounts may make a more equitable distribution of the tax on the gross receipts of the interstate pipe line, upon satisfactory evidence submitted to him.

Article 7375 provides for a gross receipts tax on sleeping, palace and dining car companies "equal to five per cent of" *the gross receipts earned from any and all sources whatever within this State* except from receipts derived from buffet service.

Articles 7376 provides for a gross premium receipts tax on insurance companies of two and six tenths per cent of *premiums received in this State upon property and from persons residing in this State.*

Article 7377 provides for a gross receipts tax on wholesale dealers in oils, "equal to two per cent of" *the gross receipts from any and all sales made within this State.*

Article 7379 provides for a gross receipts tax "equal to one-half of one per cent of" *all sales made within this State by spirituous, vinous or malt liquors or medicated bitters.*

Article 7380 provides for a gross receipts tax "equal to fifty per cent of" the gross receipts from *the sale of pistols within this State.*

Article 7381 provides for a gross receipts tax "equal to one per cent of" *all sales of text or law books within this State.*

Article 7382 provides for a gross receipts tax from telephone companies "equal to one and one-half per cent of" *the gross receipts from business within this State.*

Article 7383 provides for a gross receipts tax "equal to one-half of one per cent of" *the total amount of all oil produced from oil wells within this State.*

Article 7384 provides for a gross receipts tax against terminal companies "equal to one per cent of" *the total amount of its gross receipts within this State.*

No. 16.

In The

Supreme Court of the United States

OCTOBER TERM, 1917.

BEN F. LOONEY, Attorney General of the State of Texas, Appellant,

vs.

CRANE COMPANY, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLEE.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Appellee.

ARGUMENT.

Since this case was argued the court, on June 4, 1917, affirmed Albert Pick & Co. v. Frank C. Jordan, Secretary of State of the State of California. The memorandum opinion reads:

> "Per curiam: Judgment affirmed with costs upon the authority of Kansas City, Fort Scott & Memphis Railway Co. v. Botkin, 240 U. S. 227.

The California statutes have some points of similarity to those of Texas challenged in the record, but, as we think, are dissimilar in the determining features as between an excise tax reasonably limited and a tax on the right to do interstate business within the state, or one on property beyond the borders of the state. The California tax, and the Kansas tax discussed in the Botkin case, are measured by the authorized capital stock. The permit tax required of Albert Pick & Co. on its authorized capital stock of $1,000,000. was $100., and the annual license tax was $250., so that this company in order to do local business in California was required to pay for the first year $350., and for each subsequent year $250. This taxation would seem reasonable, viewed as an occupation or privilege tax, and Albert Pick & Co. could scarcely say that its property beyond the jurisdiction of California was taxed, or that its interstate business was burdened as an appreciable and direct incident of it.

The result of applying the California statutes to Albert Pick & Co. was similar to that reached under the Massachusetts laws, applied to the transactions in Baltic Mining Co. v. Massachusetts, 231 U. S. 68.

A like result had been found by this court to flow from the application of the Kansas act, with a maximum charge of $2500. against all corporations having paid up capital of $5,000,000. or more, to the facts disclosed by the record in Kansas City Ry. v. Kansas, 240 U. S. 227.

These acts of Kansas and California are reasonable in their operation as applied to the complainants attacking them, for they resulted in the imposition of a tax so small when compared with the probable amount of domestic business to be done as to exclude the conclusion that its necessary effect was to burden interstate commerce, or operate upon property beyond the jurisdiction of the taxing state.

The Texas statutes challenged by the appellee disclose a different intent and produce an entirely dissimilar result when applied to the business of appellee shown in the record. The permit tax, based on Crane Company's authorized capital stock of $17,000,000., all paid up, only one thirty-ninth of which was in anywise employed in Texas, is $17,040., as against $100. in California for Albert Pick & Co. with its capitalization of $1,000,-

000., and as against $2500. in Kansas for the Kansas City, Fort Scott & Memphis Railway Co. with a capitalization of $31,660,000. The Texas payment would cover only ten years, whereas there seems to be no limit of time covered by the filing fee in the California act. A fee of $17,040. solely for the right to initiate a domestic business, the aggregate sales of which amounted to about $163,000. (R. 33), could not have been the purpose of the legislature. The levy of so large a sum under such conditions carries with it the necessary suggestion that not only the local business **but the whole business** of the corporation, wherever transacted by the use of any portion of its capital stock, was being taxed. No such suggestion necessarily arises from the application of the Kansas or California acts to the conditions inducing their discussion by this court.

It appears that there is no filing fee in Kansas; there is such a fee in California and in Texas. In addition to the filing fee of these states there is an annual franchise tax. In California this is measured by the authorized capital stock. In Texas, when applied to the appellee it is not so measured, but the measure is authorized capital stock, issued and outstanding, **plus surplus and undivided profits.** While the measure adopted in Kansas and California, of the authorized capital stock, may suitably be used to ascertain the value of the privilege of

doing business in corporate form with a capital to the amount authorized by the charter, whether the privilege is or is not in fact fully exercised, and therefore is a measure not necessarily associated with the actual business transactions of the corporation, or the actual value of its property,—rather with its potential business and property—the measure employed in the Texas act has direct relation quantitively to the property and business of the company in that every dollar of assets used in its business increases the amount of the tax. Crane Company's surplus, undivided profits and authorized capital must necessarily constitute invested property. Of this property only one eighty-third part was located in the State of Texas, and only one thirty-ninth part was employed in and about its business in, into, or outward from Texas whether intrastate or interstate, yet all was taxed.

This court has said that every tax case rests on its own facts. The facts of this record show that the direct and necessary operation of the laws challenged violates the right of the appellee to do its interstate business unburdened by state taxation and to hold its property situated beyond the territorial confines of the state of Texas free of taxation by that state. If it should comply with these laws, appellee's interstate commerce would be burdened and its property wherever situated subjected to a tax by the state of Texas. Without complying with

them it could not transact a domestic business in Texas irretrievably interwoven with its interstate business in and out of there, carried on with the same men, women and inanimate instrumentalities. Cutting out the domestic business would irreparably wound the interstate business without which again the domestic business could not be conducted with profit, and therefore not at all.

The oppressive character of the permit tax challenged is illustrated by subsequent legislation. Had appellee paid the $17,040. on January 15, 1915, it would have secured a permit to do business for ten years. Yet two years later the legislature repealed that law, and enacted in lieu of it one with a limitation of $2500. The result would have been the payment by appellee for the ten year's privilege of $14,540. more than, under the existing law, it would be required to pay.

Since the decision of this case in the court below, the legislation of Texas has been conformed to the constitutional limitations on the power of the state declared therein.

We append hereto copies of the recent statutes fixing the permit fee and franchise tax of foreign corporations doing business in Texas, passed on March 17, 1917, and now in effect.

We respectfully submit that the decree of the lower court should be affirmed.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Solicitors for Appellee.

I.

APPENDIX.

FRANCHISE TAX OF FOREIGN CORPORATIONS.

(S.B. No. 94) Chapter 84.

An Act to be entitled "An Act to amend Article 7394 of the Revised Statutes of 1911 so as to provide that the franchise tax on foreign corporations therein levied shall be based upon that proportion of the total authorized capital stock of such corporation as the gross receipts of such corporation from its Texas business bears to its total gross receipts."

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 7394 of the Revised Statutes of the State of Texas shall be so amended as hereafter to read as follows:

Except as herein provided, each and every foreign corporation authorized, or that may hereafter be authorized, to do business in this State shall, on or before the first day of May of each year pay in advance to the Secretary of State a franchise tax for the year following which shall be computed as follows: The total capital stock of such corporation, the total gross receipts of such corporation from all its business and the total gross receipts from the business of such corporation for the calendar year immediately preceding shall be ascertained by the Secretary of State from sworn reports of the officers of such corporation or by such other method as

may satisfy the Secretary of State and the capital stock of such corporation upon which the franchise tax herein provided is based shall be that proportion of the entire authorized capital stock as the gross receipts from the Texas business of such corporation done within the State of Texas bears to the total gross receipts of such corporation from its entire business and the capital stock assignable to the Texas business and upon which the fees hereinafter provided shall be calculated and based being thus ascertained, the franchise tax which is hereby provided shall be computed as follows: $1. on each $1000. or fractional part thereof up to and including $100,000.; $2. on each $5,000. or fractional part thereof in excess of $100,000. and up to and including $1,000,000.; $2. on each $20,000. or fractional part thereof in excess of $1,000,000. and up to and including $10,000.000. and $2. on each $50,000. of such stock in excess of $10,000,000.; provided, however, that where such corporation has a surplus or undivided profits the same shall be added to the entire capital stock of such corporation and shall be taken and computed as a part thereof in determining the amount of such entire capital stock; provided, that where a foreign corporation applying for a permit has theretofore done no business in Texas the franchise tax herein provided shall not be payable until the end of one year from the date of such permit at which time the franchise tax shall be computed upon that proportion

of the entire capital stock ascertained as above required as the receipts from its Texas business bears to the receipts of the corporation from its entire business for the same period; and the second payment of such franchise tax shall be made for the period intervening between the date of such first payment and the first day of May following, the proportion of capital stock upon which the same shall be computed to be the same proportion that the receipts from the Texas business for such period bears to the receipts of the corporation from its entire business for the same period, and that thereafter such franchise tax shall be payable annually on the first day of May for the year succeeding computed upon that proportion of the entire capital stock of such corporation which the receipts from the Texas business of such corporation bears to its entire receipts for the calendar year preceding as herein above provided.

Section 2. All laws and parts of laws in conflict herewith are hereby repealed.

Section 3. The near approach of the time of the first day of May on or before which, under existing law, payment of franchise taxes must be made and the fact that Article 7394 of the Revised Statutes which is hereby amended requiring the franchise taxes therein levied to be computed upon the entire capital stock of such foreign corporation has resulted in large losses of reve-

nue to the State of Texas create an imperative public necessity for the suspension of the constitutional rule providing that bills shall be read on three successive days and an emergency that this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved March 17, 1917.
Takes effect 90 days after adjournment.

PERMIT FEES OF FOREIGN CORPORATIONS.

S.B. No. 95.) Chapter 85.

An Act to be entitled "An Act to amend Article 3837 of the Revised Statutes of 1911 so as to provide that the permit fees for corporations payable to the Secretary of State under the provisions of Article 3837, Chapter 1, Title 58, of the Revised Statutes of the State of Texas shall be based upon the capital stock of corporations domestic and foreign issued and outstanding, and that such permit fees shall not exceed the sum of twenty-five hundred dollars."

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 3837 of the Revised Statutes of Texas be amended so as to hereafter read as follows:

Art. 3837. The secretary of state, besides other fees that may be prescribed by law, is authorized and required to charge for the use of the state the following fees: ****

V.

For each foreign corporation obtaining permit to do business in this state, there shall be paid to the secretary of state as permit fees the following: fifty dollars for the first ten thousand dollars of its capital stock issued and outstanding and ten dollars for each additional ten thousand dollars or fractional part thereof: provided, that in no event shall such fee exceed the sum of twenty-five hundred dollars; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph line in this state, shall in no event exceed the sum of twenty-five hundred dollars; and provided further that mutual building and loan companies, so called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars or fractional part thereof of its capital stock issued and outstanding and ten dollars for each additional one hundred thousand dollars or fractional part thereof and where the company is a foreign one, then the fee shall be based upon the capital invested in the State of Texas. * * * *

Approved March 17, 1917.

Takes effect 90 days after adjournment.

LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS, *v.* CRANE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 16. Argued May 3, 1916; restored to docket for reargument May 21, 1917; reargued November 6, 1917.—Decided December 10, 1917.

Neither the right of a State to attach conditions when licensing a sister state corporation to do local business, nor its power to tax the corporation in respect of such business, when licensed, can sustain impositions which, in the guise of permit charges or franchise or excise taxes, result in direct burdens on interstate commerce or in the

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contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigour. The United States on their part, or any of them, shall be at liberty to make respecting this matter, such laws as they think proper."

taxation of property beyond the confines and jurisdiction of the State.

These principles, repeatedly affirmed by the court, are in nowise qualified by *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, and other recent cases, involving particular state statutes which were not inherently repugnant to the commerce clause or the due process clause of the Fourteenth Amendment, and which, because of their own restrictive provisions, avoided such repugnancy in their necessary operation and effect. Those cases lend no sanction to the proposition that the duty of enforcing the Constitution may depend upon the degree of violation or of resulting wrong.

In 1889, Texas exacted of foreign corporations a charge, graduated upon capital stock, but limited to $200, for a permit to do business for 10 years. In 1893, a so-called franchise tax of $10 per annum was exacted of domestic and licensed foreign corporations alike, which was increased in 1897 to a maximum of $50 for domestic corporations, while for foreign corporations the minimum was raised to $25, and the tax was otherwise calculated by fixed percentages upon capital stock without maximum limit. After some intervening modification, it was enacted in 1907, as to both classes of corporations, that, in case the capital stock, issued and outstanding, plus surplus and undivided profits, should exceed the capital stock authorized, the franchise tax should be calculated upon the aggregate of such amounts. In the same year the permit provisions were altered by abolishing the maximum limit ($200) and increasing the percentages on authorized capital stock. An Illinois manufacturing and trading corporation engaged largely in interstate commerce obtained a 10 year permit under the Act of 1889, purchased real estate, erected warehouses and engaged in business in Texas; paid its taxes on its local property, and also those laid under the franchise laws, until its permit (obtained in 1905) was about to expire, when it brought suit against the Secretary of State and the Attorney General to enjoin the enforcement by them of the permit and franchise laws of 1907. Its authorized capital stock was $17,000,000, issued and paid up, and its surplus and undivided profits over $8,000,000. The total assessed value of its property in Texas was about $300,000. Its gross receipts and gross sales in all its business in 1913 were $39,831,000, of which only $1,019,750 had any relation to Texas, and of this nearly one-half had resulted from sales and shipments in interstate commerce. Its franchise tax had increased from $480 in 1904 to $1,948 in 1914, under the franchise Act of 1907. Its permit fee under the permit Act of 1907 would have been $17,040.

Held, that the franchise and permit taxes both violated the due process clause of the Fourteenth Amendment and directly burdened interstate commerce.

A suit to enjoin state officials from enforcing an unconstitutional tax is not a suit against the State.

218 Fed. Rep. 260, affirmed.

THE case is stated in the opinion.

Mr. C. M. Cureton, Assistant Attorney General of the State of Texas, with whom *Mr. Ben F. Looney*, Attorney General of the State of Texas, and *Mr. C. A. Sweeton*, Assistant Attorney General of the State of Texas, were on the briefs, for appellant:

The statutes in question do not seek to lay a charge or tax upon any foreign corporation seeking to do an interstate business only. *Alden* v. *Jones Buggy Co.*, 91 Texas, 22; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468; and other Texas cases. The State has a perfect right to charge for and tax the privilege of doing local business and measure the amount of the charge or tax by the capital of the corporation, including receipts or property employed in part in interstate commerce; and this is the rule although the transaction of intrastate business might not exceed one-fourth of its aggregate business and although the same might be a source of profit and convenience to it and in that way an aid to its interstate business. *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *White Dental Mfg. Co.* v. *Massachusetts*, *ib.*; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Barron* v. *Burnside*, 121 U. S. 186; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Pembina Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181. It is important to bear in mind the distinction

between an ordinary trading corporation, like the appellee, and a corporation, such as a railroad or telegraph company, which by the very nature of its business is an instrument of commerce. Corporations of the latter class, when engaged in both kinds of commerce, cannot be made to pay a franchise tax measured by their entire capital stock because, by burdening the instrument of interstate commerce, the tax would be a burden upon interstate commerce itself. A trading corporation, *per contra*, can engage in interstate commerce or not, as it sees fit, and a tax according to its capital therefore cannot be said to burden the interstate commerce in which it elects to engage. The case is ruled by *Baltic Mining Co.* v. *Massachusetts, supra*, and *White Dental Mfg. Co.* v. *Massachusetts, supra*. Here, as there, the tax is not a property but a franchise tax. *Gaar, Scott & Co.* v. *Shannon*, 52 Tex. Civ. App. 644. The appellee has a substantial local business, subject to local franchise and privilege taxes. It would be an entirely new doctrine to hold that a prohibition of the business, or a tax in the nature of a condition upon its permission, amounts to a burden on the interstate business merely because appellee's voluntary methods make success in the one line of business in some measure dependent on the other.

The cases relied upon by appellee are either those in which the corporations were engaged exclusively in interstate commerce, or those in which they were operating instrumentalities of such commerce. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Adams Express Co.* v. *City of New York*, 232 U. S. 14; *Platt* v. *City of New York*, 232 U. S. 35; *Myer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Williams* v. *City of Talladega*, 226 U. S. 404; *Buck Stove &*

Range Co. v. *Vickers*, 226 U. S. 205; *International Textbook Co.* v. *Pigg*, 217 U. S. 91.

Appellee's Texas business was mainly intrastate. One-fourth of the goods was sold in broken packages. The original packages were mingled with these and exposed with them for sale, thus becoming incorporated with the mass of the property in the State. *Brown* v. *Houston*, 114 U. S. 622; *State* v. *Intoxicating Liquors*, 65 Maine, 556.

If the statutes in question be valid, the suit is in essence a suit against the State.

The permit fee and franchise tax acts are distinct and independent. The fee is calculated on the basis of authorized capital stock, not on actual capital, and the tax would be the same whether the corporation had no capital or had capital greatly in excess of the amount authorized. In no sense is it a property tax. In this case it is of relatively small amount. Payable only once every ten years, it comes to but 1% of the authorized capital in 100 years. This is small compared with the enormous authorized capital; and the charge is not exacted from the capital used in interstate commerce. The absence of a limit is immaterial, for just as the tax could not be saved, however small, if levied on the receipts from interstate commerce, so its mere amount could not condemn it if it does not touch property at all. See *Pick & Co.* v. *Jordan*, 169 California, 1, affirmed by this court in 244 U. S. 647. If the fee were large, so is the privilege granted. It was for the legislature to value the privilege and for the Crane Company to decline it if unwilling to pay the price.

The other tax is not a property but a privilege or franchise tax. *Gaar, Scott & Co.* v. *Shannon*, 52 Tex. Civ. App. 644. Surplus or undivided profits are considered, but only for the purpose of measuring the value of the franchise. The legislature doubtless found a reasonable relationship between that value and the capital in use. The tax does

not necessarily fluctuate with the amount of interstate business. The real question is whether or not it is greater than the value of the privilege granted. If the tax should be held void in so far as measured by surplus and profits, it may still be upheld in so far as measured by the authorized capital stock. *Field* v. *Clark*, 143 U. S. 696; *Huntington* v. *Worthen*, 120 U. S. 102; *Zwerneman* v. *Von Rosenberg*, 76 Texas, 522; *State* v. *Laredo Ice Co.*, 96 Texas, 461.

If the present acts be void, their predecessors are not and the company, refusing to comply with the latter, is not entitled to injunctive relief.

Mr. Joseph Manson McCormick, with whom *Mr. Francis Marion Etheridge* was on the briefs, for appellee.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Chartered in 1865 by the legislature of Illinois, the Crane Company had its domicile and principal establishment at Chicago. It carried on its chartered business of manufacturing and dealing in hardware, railway supplies, building materials, agricultural implements, etc., not only in Illinois but in other States, by the shipment of merchandise on orders obtained through the solicitation of its agents and sent to Chicago for execution, or orders sent to Chicago through the mail. The company, moreover, established agencies in other States to which goods were also shipped from Chicago or from other points where they were bought and shipment directed, from which agencies such goods were sold and delivered either in the original or broken packages as was most convenient. Such agencies also became supply depots from which interstate commerce was carried on by filling orders received from other States.

In the State of Texas for the purpose of facilitating the carrying on of its business by all the methods stated, the company acquired real estate at Dallas, and built a depot or warehouse, and also had a warehouse at another place in the State.

In 1889 Texas enacted a statute entitled, "An act to require foreign corporations to file their articles of incorporation with the secretary of state, and imposing certain conditions upon such corporations transacting business in this state. . . ." (Acts of 1889, p. 87.) This act not only compelled the filing of the charter with the Secretary of State, but exacted for a permit to do business a minimum charge of $25 based upon $100,000 of capital stock and an increased amount predicated upon capital stock until the exaction amounted to $200, which was the limit, and the permit which was authorized to be issued by the Secretary of State was limited to ten years' duration. The tax imposed therefor, if the permit was enjoyed for the stated period, could not in any event exceed $20 a year, whatever might be the amount of capital stock of the corporation.

As early as 1893 what was denominated a franchise tax was provided, imposing upon each and every domestic as well as foreign corporation having a permit the duty of paying $10 a year. (Acts of 1893, p. 158.) In 1897 this described franchise tax was modified. (Acts of 1897, p. 168.) As to domestic corporations, while retaining the minimum charge of $10, the maximum was raised to $50. And as to foreign corporations the minimum was raised from $10 to $25 and the maximum limit was removed by fixing percentages of charges upon the capital stock, increasing without limitation. Without in detail following the legislation as to taxes denominated as franchise from the date stated down to the period when this suit was commenced, it suffices to say that the tax itself was preserved with some increases in the bases upon which

it was to be calculated; but in 1907 it was enacted both as to domestic and permitted foreign corporations that in case the capital stock of a corporation "issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock," the franchise tax should be calculated upon the aggregate of such amounts, thereby increasing to that extent the levy. (Acts of 1907, p. 503; Revised Statutes, 1911, Art. 7394.)

The authorized capital stock of the Crane Company was $17,000,000, which was paid up and issued, and just prior to the institution of this suit the surplus and undivided profits of the company amounted to $8,139,000. The total assessed value in Texas of its real estate, money there employed and merchandise there held amounted to $301,179. The company's gross receipts and gross sales in all its business in all the States for the year 1913 amounted to $39,831,000, of which only $1,019,750 had any relation to the State of Texas and nearly one-half of this amount was the result of transactions purely of an interstate commerce character arising from the sale and shipment of goods from other States to purchasers in Texas who ordered them and from the shipment from Texas to other States for the purpose of filling orders sent from such States.

The Crane Company was assessed and paid taxes in Texas as other taxpayers on its real estate, its money on hand in Texas and its stock in trade in that State. In 1905, having filed its articles of incorporation with the Secretary of State, it paid the permit tax of $200 for the ten-year period as prescribed by the permit Act of 1889. From 1904 down to and including 1914 the company paid the yearly franchise tax, the amount increasing from $480 in 1904 to $1948 in 1914, the increase presumably resulting from the increase of rate of such tax by the legislation which we have indicated and from the fact that by the amendment of the Act of 1907 the surplus and un-

divided profits of the company became susceptible of being taken into view in addition to its authorized capital stock.

In the same year in which the legislation was enacted providing for the taxation on the basis of surplus and undivided profits for the purpose of the franchise tax there was also enacted a law vastly increasing the amount of the permit tax. (Acts of 1907, S. S., p. 500; Revised Statutes, 1911, Art. 3837.) We say vastly increasing because, although the standard for the levy of that tax, the authorized capital stock, was retained, the maximum limit which was $200 for ten years under the previous law was removed and the percentages of levy on the authorized capital stock were so augmented that the permit for which the company paid to the Secretary of State $200 for ten years in 1905 under the new law would have required the company to pay in order to do business in the State the sum of $17,040.

Shortly before its existing permit for ten years taken in 1905 expired the company commenced the present suit in the court below against the Secretary of State and the Attorney General to enjoin the enforcement by them of the statutes embracing the permit tax and the franchise tax on the grounds that both were repugnant, *a*, to the commerce clause of the Constitution of the United States because imposing a direct burden on interstate commerce; *b*, to the due process clause of the Fourteenth Amendment because constituting a taking of property; and *c*, to the equal protection clause of the Fourteenth Amendment based upon what were urged to be discriminatory provisions in the acts. The parties having been fully heard on an application for an interlocutory injunction on the pleadings and by affidavits from which the case as we have stated it indisputably results, by a court organized under the Act of Congress of June 18, 1910 (36 Stat. 557, c. 309, § 17; Judicial Code, § 266), the in-

terlocutory injunction was granted and the enforcement of the laws restrained, the matter being now before us on an appeal from such order. 218 Fed. Rep. 260.

Passing the contention as to the denial of the equal protection of the laws, which as we shall see it is unnecessary to consider, we come to dispose of the two other contentions, that is, the direct burden on interstate commerce and the want of due process.

It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the State undoubtedly possessed, that is, the authority to control the doing of business within the State by a foreign corporation and the right to tax the intrastate business of such corporation carried on as the result of permission to come in. The sole contention, then, upon which the acts can be sustained is that although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is

unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established. Indeed the cases referred to were concerned in various forms with the identical questions here involved and authoritatively settled that the States are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State in violation of the Constitution, or because of the right to exclude to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223, U. S. 280, 285.

The dominancy of these adjudications is plainly shown by the fact that as the result of the decision in the leading case (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1), the Supreme Court of the State of Texas, recognizing the repugnancy of the permit tax law here in question to the Constitution of the United States, enjoined its enforcement (*Western Union Telegraph Co.* v. *State*, 103 Texas, 306), and following that ruling the legislature of the State has amended both the permit tax law and the franchise tax law now before us, presumably in an effort to cure the demonstrated repugnancy of the statutes, before amendment, to the Constitution of the United States. Of course, whether the amendments as adopted accomplished the purpose intended, is a matter which we are not called upon to consider and as to which we express no opinion.

But despite the controlling decisions dealing with cases in substance identical in fact and principle with the case here presented and the effect given to them in Texas as to one of the statutes here involved, it is now insisted that the statutes are not repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases.

The demonstration of error in the argument which results from this situation might well cause us to go no further in its consideration. In view, however, of the gravity of the subject to which the argument relates and the misconception and resulting confusion in doctrine which might result from silence, we briefly notice it. In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698, that "The substance and not the shadow

determines the validity of the exercise of the power." In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all of the cases that they in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution.

It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion, since the later cases rested upon particular provisions in each particular case which it was held caused the general and recognized rule not to be applicable.

Some suggestion is made in argument of the possibility of treating the franchise tax as not repugnant to the Constitution although that result be necessarily reached as to the permit tax. But we are of opinion that the proposition is without merit as the interdependence of the two provisions obviously results from the character of the subjects with which they deal and the mode in which the statutes deal with them. Indeed that conclusion would seem to necessarily follow from the legislative history of both and the concordant nature of their develop-

ment. It finds additional and strongly persuasive support from the fact that although the controlling effect of the ruling in *Western Union Telegraph Co.* v. *Kansas*, *supra*, was applied by the state court to only one of the statutes, the permit tax, when the curative power of legislation was exerted it was made applicable to both and both were therefore modified. Aside from this view, however, as, from the history which we have given of the franchise tax, its provisions were clearly intended to reach all activities and property of the corporation wherever situated, that statute when separately considered would come directly within the control of the doctrine of the previous cases upon which our conclusion is based.

There is a contention to which we have hitherto postponed referring, that the court below was without jurisdiction because the suit against the state officers to enjoin them from enforcing the statutes in the discharge of duties resting upon them was in substance and effect a suit against the State within the meaning of the Eleventh Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities. *Ex parte Young*, 209 U. S. 123; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278.

It follows from what we have said that the court below was right in awarding an interlocutory injunction to restrain the enforcement of the assailed statutes and its order so doing must be and the same is

Affirmed.